

Client Alert

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Germany capital market and corporate law update: The new Transparency Register is online – what you need to know

By Dr. Sebastian Schwalm and Dr. Anna Catharina Wolschner

The revised Anti-Money Laundering Law (law on tracing profits from serious criminal activities (*Geldwäschegesetz – GwG*)) will provide for the introduction of an electronic transparency register as of October 1, 2017. There, information about the economic beneficiaries of German companies is recorded. The data required for this must be transmitted to the Transparency Register by the companies themselves. The disclosures must be made for the first time by October 1, 2017. On September 25, the federal administration responsible for the Transparency Register published its long awaited guidelines. We would like to provide in the following a first overview of the new regulations and their consequences for you.

WHAT IS AT ISSUE?

A register will be created, indicating the “economic beneficiary” of companies and associations. “Economic beneficiaries” includes every natural person (no companies!) who, with regard to a company:

- Holds more than 25 percent of the capital shares,
- Controls more than 25 percent of the voting rights, or
- Exercises control in a comparable way.

The economic beneficiary’s (i) first and last name, (ii) birthdate, (iii) domicile, and (iv) type and extent of commercial interest are recorded.

WHO IS AFFECTED?

In principle, registrations must be made in the Transparency Register by all companies and associations that are entered in a register in Germany, in particular: GmbH, UG, AG, SE, KGaA, KG, OHG, GmbH & Co. KG, cooperatives, and mutual societies. The GbR (civil law partnership) is not included.

Economic beneficiaries, and therefore those who are obliged to report to their respective companies, are those natural persons (not companies) who are the highest shareholders (so-called ultimate beneficial owners). The regulations apply without exception and thus also to foreigners or persons domiciled in a foreign country.

The information required for reporting to the Transparency Register must be provided to the companies by the economic beneficiaries without delay and without any request from the company to do so. The first reporting must be made by the companies by October 1, 2017, which also means that, by this date, the economic beneficiaries must convey the required information to their companies.

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Exemption with regard to already existing entries in the register

An exemption applies if the information to be reported is already in the Commercial Register, Partnership Register, Register of Cooperatives, Register of Associations, or Companies Register (in the following referred to respectively as "Register"). This exemption is, however, subject to considerable restrictions, so that, despite an entry in the Register, there is often still an obligation to report to the Transparency Register:

1. The information must be *electronically* retrievable in the Register.

Example: For a GmbH, this may be questionable if the last shareholder list stems from a time before 2007, since the Commercial Register has only been maintained electronically since the year 2007.

2. The Register must indicate the *last economic beneficiary* (ultimate beneficial owner).

Example: In the shareholder list of a GmbH, a foreign company is entered as the shareholder. This is not sufficient to fulfill the requirement for the exemption, since this foreign company is not the *ultimate beneficial owner* of the GmbH, but rather it is the economic beneficiary of the foreign company (which does not result from the German Commercial Register).

3. The information must be *completely* retrievable in the Register.

Example: In the list of shareholders of a GmbH, the information about the date of birth or the domicile is missing.

4. The information retrievable in a Register must be *complete*, especially with respect to the economic beneficiary.

Example a): A GmbH has two subsidiaries, each holding 20%, which are shown in the list of shareholders. However, both shareholders have concluded an additional voting trust agreement that is (rightly) not indicated in the list of shareholders.

Example b): A GmbH has a shareholder who is also entered in the list of shareholders. However, this shareholder, acting as custodian based on a trust arrangement, holds the company shares for a third party.

Further practice-relevant examples include sub-participations, silent partnerships, and consortium agreements, as well as the right to grant the right to appoint legal representatives.

Should one of the above four points not be fulfilled, then, despite being entered in the Register, there could arise an obligation to report to the Transparency Register.

Practical tip

- Even if, in the final analysis, due to an already existing entry in the Register, no reporting obligation exists, all companies should examine carefully whether all requirements for exercising the exemption option are really fulfilled. Especially in the case of lists of shareholders of a GmbH, it is advisable to make a careful inspection regularly.
- Since, without the knowledge of the company, there can be voting trust agreements or trust agreements, even in the case of an existing Register entry, it is recommended to ask the shareholders in any case.
- The share register, in the case of registered shares, is not among the Registers that exempt one from a reporting obligation. As long as all reportable information is entered there, it is not necessary to provide

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this information to the company through the shareholder. Nevertheless, the company must still report this information to the Transparency Register.

Exemption relating to stock exchange listing

Companies whose shares are admitted to trade on a regulated market are not subject to a reporting obligation. Here the economic beneficiaries are already set out in the notification of voting rights pursuant to the German Securities Trading Act (WpHG).

Companies whose shares are traded only on the open market are not deemed to be listed within the meaning of this regulation and thus do not profit from this exemption.

Practical tip

- Despite this exemption, listed companies should examine whether there is a reporting obligation within the corporate group. This would be the case, for example, if a non-Group investor who is not entered in a Register (e.g., natural person, foreign company) had a participation in a subsidiary of more than 25%.

WHAT MUST BE DONE IF THERE IS A REPORTING OBLIGATION?

The companies with a reporting obligation must (i) obtain the necessary information, (ii) preserve it, (iii) keep it updated, and (iv) immediately transmit it to the office maintaining the register for entry in the Transparency Register.

According to the government's reasoning, the companies must not make their own inquiries into who the economic beneficiary is. The economic beneficiaries must provide this information to the company on their own. However, the companies should examine at least once a year whether they have by some other means become aware of relevant information that would give rise to a change of economic beneficiaries.

Practical tip

- Nevertheless, there are good reasons for actively approaching one's own shareholders to determine the economic beneficiary. First of all, the wording of the law contradicts the justification for the law, because to "obtain" ("*einholen*") means even more than just to "receive" or "accept" ("*entgegennehmen*").
- On the other hand, there will, in particular, be foreign investors who are as of yet unaware of the new regulations. They should therefore be able to expect that their companies will notify them about a possible reporting obligation, especially in order to avoid a potential administrative fine.
- Companies should set up an internal monitoring and reporting system in order to comply with their obligations (to obtain, preserve, update, report) completely and in a timely manner.
- To the extent that shareholders have already disclosed the relevant information to the company in the past, this must not be done again. Examples for this are the provision of the name of the economic beneficiary by the company to its bank within the framework of anti-money laundering checks or the entry of the name of a shareholder in the share register.

WHICH CONSTELLATIONS REQUIRE SPECIAL ATTENTION?

Shareholder agreements

Cases that are problematic are those in which agreements were concluded between shareholders that give rise to a "control by some other means." These are intentionally dealt with confidentially by the involved parties on a regular basis and must now, under certain circumstances, be disclosed. Since there is no legal

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definition, these constellations must be examined on an individual case basis. Mere options to acquire shares or voting rights do not thereby trigger a reporting obligation, however (see FAQ, Federal Office of Administration's link).

Group company structures

The revised GwG does not provide for reporting by the highest company of the group, in order for all companies of the group to be exempt. Therefore, in principle, all affected companies must make their own report to the Transparency Register.

Insofar as the economic beneficiary is indicated in a chain of register entries, however, it is possible to apply the exemption from the reporting obligation for all companies of the chain, based on existing register entries (see FAQ, Federal Office of Administration's link).

A problematic area that is still not clear is the information on the type and extent of the economic interest in the case of group companies with an international context.

Involvement with foreign countries

In the German Registers, one finds no information on the economic beneficiaries of corporations and partnerships if these persons hold their shares in Germany indirectly via holding companies that are foreign-based. Thus in these cases a report must be made to the Transparency Register.

Information on the “type and extent of the economic interest”

It must be possible to derive the position as economic beneficiary from the information on the type and extent of the economic interest, for example, through the information on capital shares or voting rights.

It has not yet been definitively established which information must be provided in the exercise of control “in a comparable way.” In consortium agreements and voting trust agreements that implement controls, this information must be provided. The agreements themselves do not have to be transmitted.

Diversified holdings / Incomplete information

If, after conducting extensive examinations, no natural person can be determined as the economic beneficiary, or if there is any doubt that the person identified is the economic beneficiary, the legal representative, managing partner, or partner of the association is deemed to be the economic beneficiary.

This relates, on the one hand, to companies with diversified holdings in which no shareholder holds more than 25% of the shares or voting rights and also for which there are no shareholder agreements. On the other hand, this relates to cases in which the shareholder of the German company with the reporting obligation is another company, and that company provides no information about its shareholders. This can be the case, in particular, in matters with an international context.

Special provisions

For a one-step indirect control as well as for the appointment of the economic beneficiary of foundations and administrators of trusts (trustees), special rules apply.

FAQ, Federal Office of Administration's link

The regulations concerning the Transparency Register currently still contain some ambiguities. The responsible Federal Office of Administration has now published FAQ under this [link](#), which give tips on the implementation of the new provision.

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WHO CAN INSPECT THE TRANSPARENCY REGISTER?

The Transparency Register will not be open for inspection by the public. Only certain public authorities may inspect the Transparency Register, as well as (case-related) those with a reporting obligation. Beyond this, only those who can prove a “justified interest” may inspect the Register. Such an interest is the case, in particular, if there is a connection with the prevention and combatting of money laundering and therewith related ‘predicate offenses,’ such as corruption and terrorist financing. According to the grounds for the law, this can also be an investigative journalist. Details are laid down in the regulation to be adopted on the inspection of the Transparency Register. An inspection is possible starting from December 27, 2017.

WHAT HAPPENS IF ONE DOES NOT REPORT?

Infringements of the new provisions by an economic beneficiary with a notification obligation as well as by the company with a reporting obligation can be punished as an administrative offence with fines of up to 100,000 EUR (simple infringement), or up to 1 million EUR, or twice the economic advantage gained from the infringement (serious or repeated infringement). In addition, decisions imposing fines can be made public on the Internet (*naming and shaming*).

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