



New transparency requirements for the disclosure of beneficial owners of companies and associations – Transparency Register

October 2017

By means of the law implementing the Fourth EU Money Laundering Directive as of 23 June 2017 (Federal Law Gazette (Bundesgesetzblatt) I 2017, page 1822), the German lawmaker has created the Transparency Register, which aims to increase the transparency of participations in companies in order to prevent money laundering and the financing of terrorism. The law came into force on 26 June 2017. The Transparency Register is intended to contain personal data of all individuals who are “behind” corporations, partnerships, foundations or trust-like structures and who control them. Control-giving arrangements such as voting agreements are also to be disclosed. The required information must be submitted to the Transparency Register for the first time by 1 October 2017; it can be inspected starting on 27 December 2017. In case of listed companies, due to the capital markets publication requirements which generally apply for listed companies, the notification requirements vis-à-vis the Transparency Register are typically deemed to be fulfilled.

Summary

In implementation of the Fourth EU Money Laundering Directive (Directive 2015/849), a new Anti-Money Laundering Act (Geldwäschegesetz - GwG) came into effect on 26 June 2017. The aim of the GwG is to prevent money laundering and terrorism financing. The key element is the introduction of a so-called transparency register, in which the beneficial owners of all private-law associations and trust-like structures are covered (Transparency Register).

Almost all German companies are affected. The term association in the sense of the GwG includes all registered partnerships and corporations but also other corporate bodies such as membership corporations (Vereine) and foundations (Stiftungen). The associations shall submit to the Transparency Register personal details and the nature and extent of the economic interest of all individuals, which own or control the association. Also, control-giving arrangements between shareholders, such as voting- (Stimmbindungs-), pool- or consortium (Konsortial-) agreements must be disclosed. In order to ensure that the associations receive the necessary information, the beneficial owners are required to submit such information to the associations. The duty to notify the Transparency Register is deemed to be fulfilled if the information re-

garding the beneficial owners is already contained in electronically retrievable documents and registrations in public registers.

The Transparency Register is intended to be inspected in addition to supervisory and prosecution authorities, by any person with a legitimate interest. Access restrictions are only possible in exceptional cases. In the event of violations of the GwG, considerable financial penalties may be imposed.

Companies operating in the financial and insurance sector as well as certain other professional groups (including lawyers and notaries) will be subject to additional compliance requirements. These include, inter alia, the development of an effective risk management, the carrying out of a risk analysis, the creation of business- and customer-related safeguards, the appointment of an anti-money laundering officer (Geldwäschebeauftragter), documentation requirements as well as special additional requirements for parent companies in group structures.

The Federal Office of Administration (Bundesverwaltungsamt), which is responsible for the management of the Transparency Register, has published short answers to frequently asked questions at http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_ZMV/Transparenzregister/FAQ/faq_node.html.

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I. Who is required to submit?

The obligation to notify the Transparency Register is addressed to all corporate bodies of private law (Juristische Personen des Privatrechts) and registered partnerships (eingetragene Personengesellschaften) (§ 20 para. 1 GwG). This means that all corporations (stock corporation (Aktiengesellschaft), Societas Europaea, company with limited liability (Gesellschaft mit beschränkter Haftung)), commercial partnerships (ordinary partnership (Offene Handelsgesellschaft) and limited partnership (Kommanditgesellschaft)) as well as foundations having legal capacity (rechtsfähige Stiftungen), registered membership corporations (rechtsfähige Vereine), cooperative societies (Genossenschaften) and partnership companies (Partnerschaftsgesellschaften) are covered. As a matter of principle, the GwG extends the transparency obligations to companies that are listed on an organized market within the meaning of the German Securities Trading Act (Wertpapierhandelsgesetz -WpHG). This inclusion is justified by the fact that in favour of listed companies, the notification requirements are deemed to be fulfilled (see paragraph V.) and hence, the additional expense is limited. On the other hand, the civil law partnership (BGB-Außengesellschaft) is excluded from the notification obligations.

If several associations are in a shareholding chain (Beteiligungskette), in principle, each association must notify its own beneficial owner to the Transparency Register.

The notification obligation also applies to administrators of trusts (trustees), trustees of foundations without legal capacity and with a self-serving foundation goal (nicht-rechtsfähige Stiftung mit eigennützigem

Stiftungszweck) and trustees of similar structures (§ 21 GwG). This only applies, however if the domicile or registered office of the administrator or trustee is located in Germany. On the other hand, trusts under German law are, in principle, not subject to notification requirements, unless, through the trust, 25% of the share capital or voting rights in a corporate are being held or control is exercised (see below paragraph II.).

Whether or not German branches of foreign companies are subject to notification requirements is not expressly provided for in the GwG. It needs to be distinguished: If the branch is not cooperatively organized (e.g. no corporate body of private law, registered partnership, etc.), generally, there will be no notification requirement as the prerequisites of §§ 20, 21 GwG are not met. If this is the case, however, generally, a notification requirement is to be assumed. As with any and all other constellations and structures, it is strongly advisable to look closely into the individual case and to examine it.

II. Who is the beneficial owner (wirtschaftlich Berechtigte)?

Beneficial owner is the individual, which owns or controls the association or trust-like structure (§§ 19 para. 2; 3 para. 1 GwG).

In case of associations (other than foundations), beneficial owner is, in particular, any individual, which directly or indirectly

- holds more than 25% of the share capital,
- holds more than 25% of the voting rights, or
- exercises control in a comparable manner.

Control is to be understood, in particular, as a controlling influence in the sense of the law of groups (Konzernrecht). If the beneficial owner cannot be determined without a doubt, the legal representatives, managing partners/shareholders or partners of the association are deemed to be beneficial owners (§ 3 para. 2 GwG). Therefore, in our opinion, in respect of a GmbH & Co. KG, whose legal representative and managing partner is a limited liability company (Gesellschaft mit beschränkter Haftung – GmbH) as general

partner (which is not an individual), when applying the rule pursuant to § 3 para 2 p. 5 GwG, in principle, the managing director of the GmbH (as general partner) is the beneficial owner of the GmbH & Co. KG (whereby such managing director is typically registered with the commercial register).

It is not explicitly defined in the law who is the beneficial owner of listed companies. In the grounds of the law (Gesetzesbegründung), it has been referred to the corresponding disclosure requirements, i.e. the provisions of the WpHG regarding the transparency of shareholdings. Pursuant to such rules, an individual holding three or more percent of the voting rights in a listed company would then be deemed to be a beneficial owner.

In respect of foundations with legal capacity and trust-like structures, the beneficial owner is any individual who:

- acts as trustor, trustee or protector,
- is a member of the management board,
- has been designated as beneficiary, and
- otherwise directly or indirectly exerts influence on the asset management or income management.

If the individual, who is to become the beneficiary of the assets under management, is not yet determined, the group of individuals for whose benefits the assets are to be managed or to be distributed is deemed to be the beneficial owner (§ 3 para. 3 GwG).

In the case of foundations, in principle, the founder is not to be regarded as the beneficial owner, unless he or she is also a beneficiary.

As stated above, generally, trust relationships under German law are not subject to notification requirements. However, a beneficial ownership for shareholders of an association subject to notification requirements may also result from a trust relationship (see printed materials of German parliament with index number 18/11555, p. 129). If the trustee holds for the benefit of a trustor more than 25% of the share capital or voting rights in a company subject to notification requirements or otherwise exercises control, the trustor is to be notified as beneficial owner.

In respect of membership corporations with legal capacity (rechtsfähige Vereine) and cooperative societies (Genossenschaften), special provisions apply with regard to the person subject to the notification obligation (§ 20 para 3 p. 2 through 4 GwG). If, for example, more than 25% of the voting rights are controlled by a member of a membership corporation or a cooperative society, the obligation to provide information shall be made by these members.

According to the statement of the Federal Office of Administration, a sub-partner (Unterbeteiligter) meets the prerequisites of a beneficial ownership if he or she is able to indirectly exercise control over the company through the sub-participation (cf. http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_ZMV/Transparenzregister/FAQ/fragen/02_angaben%20zum%20wirtschaftlich%20oberechtigten/azwb_frage_09.html?nn=10044858). Consequently, in the view of the Federal Office of Administration, the same principles as for a chain of shareholders do apply to sub-participations.

Generally, the heirs' community (Erbengemeinschaft) is not subject to notification requirements. If, however, the heirs' community fulfilled the prerequisite for a beneficial ownership (for example, if the heirs' community holds more than 25% of the voting rights in a corporate body), according to the statement of the Federal Office of Administration, all co-heirs of the heirs' community – independent from their individual shares in the inheritance – are beneficial owners (cf. http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_ZMV/Transparenzregister/FAQ/fragen/03_transparenzpflichtige%20einheiten/te_frage_03.html?nn=10044896).

In case the shareholders' agreement grants a veto right to a shareholder of a company, in our view, a beneficial ownership does not apply. A veto right in itself, generally, does not entitle to exercise control but only to block decisions. In this respect, the right to control is missing.

According to the statement of the Federal Office of Administration, the usufructuary (Nießbraucher) is generally not a beneficial

owner, even if the usufruct in a shareholding is more than 25%. As an exception, the usufructuary could be regarded as a beneficial owner if he or she, on the basis of specific contractual arrangements, is entitled to exercise control over the company (cf. http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_ZMV/Transparenzregister/FAQ/fragen/02_angaben%20zum%20wirtschaftlich%20oberechtigten/azwb_frage_11.html?nn=10044858).

III. Which details have to be disclosed?

The following information on a beneficial owner is to be submitted to the Transparency Register (§ 19 GwG):

- Given name and surname,
- Date of birth,
- Place of residence and
- Nature and extent of economic interest.

The information on the nature and extent of the economic interest must specify the basis of the beneficial ownership, for example if it results from the percentage of participation or the number of voting rights held, the function as legal representative, managing shareholder or partner or, in case control is exercised, other ways.

In this context, the GwG explicitly mentions agreements between a third party and a shareholder or between several shareholders. This refers to control-giving voting-, pool- or consortium agreements. Whether in these cases only the individual is to be regarded as beneficial owner who controls the pool of shareholders, or if the pool leads to a reciprocal allocation of voting rights among all pool members according to the so-called acting in concert in the sense of § 22 para 2 WpHG, is not exactly provided for in the GwG. However, in a statement, the Federal Office of Administration has clarified that if one party of the voting agreement exercises control, only that party is the beneficial owner on the basis of the voting agreement (cf.

http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_ZMV/Transparenzregister/FAQ/fragen/02_angaben%20zum%20wirtschaftlich%20oberechtigten/azwb_frage_01.html?nn=10044858).

IV. What are the compliance requirements?

In respect of the details of its beneficial owners, the notifying association must

- gather the information,
- keep the information safe,
- keep it up to date and
- immediately notify the Transparency Register.

The obligation to notify also extends to subsequent amendments to the disclosures (§ 20 para. 1 GwG). The notification obligation shall be complied with for the first time no later than 1 October 2017. Up to that point in time, the notifying parties have time to determine their beneficial owners, to see what information is already available in the company and to request missing information from the persons subject to disclosure requirement (see paragraph V.). Within the scope of their general compliance obligations, notifying associations are also to check at least once a year whether they have become aware of any other information that results in a change in the beneficial ownership.

In addition, companies from the financial and insurance sector as well as certain other professional groups (as so-called obliged parties) will be subject to additional compliance requirements starting with the commencement of the GwG. This includes, inter alia, the development of an effective risk management, the conduct of a risk analysis, the creation of business- and customer-related safeguards, the appointment of an anti-money laundering officer, documentation requirements as well as specific additional requirements for parent companies in group structures.

V. When is a duty to notify deemed to be fulfilled?

The duty to notify the Transparency Register is deemed to be fulfilled (so-called deemed fulfilment - Meldefiktion) if the information on the beneficial owner already results from electronically retrievable documents and registrations in public registers (§ 20 para. 2 GwG). These include, among others, registrations in the commercial- (Handels-), partnership- (Partnerschafts-), cooperative- (Genossenschafts-) or membership corporations- (Vereins-) register, shareholder lists or the

voting rights announcements of a listed issuer pursuant to the WpHG. However, the scope of the deemed fulfilment of the notification requirements is not unlimited. If, for example, a notification to the Transparency Register has been made and thereafter, the beneficial owner would change and such new information is available from public registers, the Transparency Register must be notified immediately (this notification obligation could be relevant, for example, in an IPO).

It is not explicitly stated whether a deemed fulfilment of a notification obligation will also occur if only part of the information requested by the GwG is available from other public registers – however, it is obvious that the deemed fulfilment of the notification obligation only applies to the extent that the information is actually available from public registers. This case would be relevant if, for example, control is exercised through other ways, for example by pooling or voting agreements, and this information is not indicated in the section "reason for the notice" in the voting rights form in accordance with the WpHG or is not derived from public registers. This would then lead to a notification obligation to the Transparency Register with regard to the "missing" information as required by the GwG. In a statement, the Federal Office of Administration has now made clear that the deemed fulfilment of a notification obligation even applies if the full scope of the beneficial ownership cannot be derived from the register (cf. http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_ZMV/Transparenzregister/FAQ/fragen/02_angaben%20zum%20wirtschaftlich%20oberechtigten/azwb_frage_04.html?nn=10044858).

Also, in case of indirect participations, the deemed fulfilment of the notification obligations fails in many cases, since the intermediary company emerges from the registers, but not necessarily the individual behind it. For example, in case of a GmbH which has a foreign company as majority shareholder, the name of this foreign company can be found in the commercial register (list of shareholders), but not, for example, the name of the individual holding a majority interest in the foreign company. If, however, the required information can be obtained from a synopsis of

different public registers which can be retrieved electronically, according to a statement of the Federal Office of Administration, the deemed fulfilment of the notification obligation applies (cf. http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_ZMV/Transparenzregister/FAQ/fragen/02_angaben%20zum%20wirtschaftlich%20oberechtigten/azwb_frage_05.html?nn=10044858).

In the course of the implementation of the Transparency Register, § 40 para. 1 of the German law on limited liabilities companies (GmbHG) was also amended by an extension of the information to be contained in the list of shareholders, namely by disclosing the percentage of the shareholding in the share capital. In a statement, the Federal Office of Administration has clarified that a notification of a GmbH to the Transparency Register is not required, if and provided that only the percentage of the shareholding is missing - this missing information does not prevent the application of the deemed fulfilment of the notification obligation (http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_ZMV/Transparenzregister/FAQ/fragen/02_angaben%20zum%20wirtschaftlich%20oberechtigten/azwb_frage_07.html?nn=10044858).

Non-listed stock corporations will typically have to notify their beneficial owners to the Transparency Register. In case of a free float of more than 75% and if control through other ways is missing, the notification requirement is deemed to be fulfilled as in such a case, the members of the management board are regarded as beneficial owners and names of such members are already entered into the commercial register. The same applies to Societas Europaea and to partnerships limited by shares (Kommanditgesellschaft auf Aktien) (see printed materials of German parliament with index number 18/11555, p. 92).

Due to the complexity of the structures of participations, it should be carefully examined in each individual case, which information is already available through public registers and which is not.

VI. Who is required to disclose?

Associations are required to gather the relevant information in respect of its beneficial owners from its direct shareholders, which are subject to a duty to report to the association (§ 20 para. 3 GwG). Therefore, the direct shareholders must examine whether (i) they are as individual itself beneficial owner (first level) of the association, or (ii) are directly controlled by an individual as beneficial owner (second level). In both cases (i) and (ii), the direct shareholder of the association is required to submit information on the beneficial owner to the association.

If an individual as beneficial owner is located further back in the chain of shareholdings (third level and up), the direct shareholder of the association is no longer required to submit information to the association. Nor is he or she required to undertake any further investigation into the chains of participation. Rather, in this case, the beneficial owner itself has to report to the association.

According to the statement of the Federal Office of Administration, the notification obligations do apply in case of chains of shareholdings regardless of whether the shareholder or beneficial owner, as the case may be, is domiciled in Germany or elsewhere (cf. http://www.bva.bund.de/DE/Organisation/Abteilungen/Abteilung_ZMV/Transparenzregister/FAQ/fragen/02_angaben%20zum%20wirtschaftlich%20oberechtigten/azwb_frage_07.html?nn=10044858).

If the obligation of an association to notify the Transparency Register is deemed to be fulfilled (see paragraph VI.), the beneficial owner is also released from the obligation to submit information regarding itself to the association. The obligation to submit information to an association is also waived if the required details have already been communicated in a different form to the association.

VII. Who can inspect the Transparency Register?

The Transparency Register is not intended to be unrestricted but only accessible to certain persons entitled to access (§ 23 para. 1 GwG). These are, in particular, certain supervisory and prosecution authorities. In addition,

every person with a legitimate interest to inspect the Transparency Register would also get access. Specialist journalists or NGOs would typically have a sufficient legitimate interest as far as they deal seriously and objectively with the prevention or the fight against money laundering and corruption. This is to be illustrated by means of readily accessible documents, e.g. statutes of NGOs. In practice, however, the criteria "serious and objective" may lead to delimitation problems.

The beneficial owner may request to restrict access to the Transparency Register in whole or in part insofar as significant interests need to be protected, such as the risk of becoming a victim of certain criminal offenses or in case of non-age or disability. However, access to authorities, certain financial institutions or notaries cannot be restricted.

The Transparency Register is managed by the Bundesanzeiger Verlag GmbH. The registration and inspection is made via the website www.transparenzregister.de.

VIII. What are the legal consequences in the event of violations?

Infringements of the transparency obligations of the GwG are an administrative offense and can be punished with a fine (§ 56 GwG). For simple violations, a fine of up to EUR 100,000 and for serious, repeated or systematic violations a fine of up to EUR 1 million or up to two times the economic advantage deriving from the infringement may be imposed. In the event of a final and definitive fine (bestandskräftiges Bußgeld), the names of the responsible person and the nature and character of the infringement would be published on the website of the supervisory authority for at least five years (naming & shaming, § 57 GwG).

XI. Outlook

Already in July 2016, the European Commission has proposed a directive amending the Fourth EU Money Laundering Directive. The proposal provides for, inter alia, the reduction of the threshold for the irrefutable presumption of (economic) control from 25% to 10% for certain risky companies and extended disclosure requirements for information to be submitted to the Transparency Register.



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