



Key information regarding the transparency register under Section 18 *et seq.* of the German Anti-Money Laundering Act (*Geldwäschegesetz*, „GwG“) – new obligations of companies and shareholders

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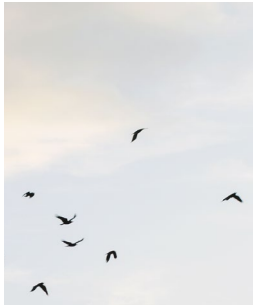
The transparency register was introduced with the entry into force of the German Act Implementing the Fourth EU Anti-Money Laundering Directive of 23 June 2017.¹ The transparency register is intended to help combat money laundering and the funding of terrorism. The general public has limited access to the register, which is maintained by the Bundesanzeiger Verlag GmbH.² In future, practically all companies **registered** in Germany will have to provide information about their “beneficial owners”, who can only be **natural persons**. This obligation also applies to **foundations without legal capacity** and trusts with their seat in Germany (s.21 GwG). These will, however, not be dealt with further here. Partnerships under the German Civil Code (GbR), which are per se not entered in any public register, and listed companies are exempt (s. 20(2) second sentence GwG).

Who is a beneficial owner?

A beneficial owner within the meaning of the German Anti-Money Laundering Act is any **natural person** who **controls** a company. “Control” is an autonomous concept under anti-money laundering law. Several persons can exercise de facto control over a company. In some cases, the beneficial owners are already registered in the German commercial

¹ German Act Implementing the Fourth EU Anti-Money Laundering Directive concerning the implementation of the EU Transfer of Funds Regulation and the reorganisation of the Financial Intelligence Unit, Federal Law Gazette I, p.1822. The Act entered into force on 26 June 2017.

² Section 1 of the German Transparency Register Authorisation Regulation, (*Transparenzregisterbeleihungsverordnung*, „TBeIV“), Federal Law Gazette I/2017, p.1938.



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register or other public registers by virtue of their formal position as shareholders, managing directors or legal representatives of a company. In such cases, the public registers provide sufficient information and no further entry in the transparency register is required (so-called assumed disclosure (*Mitteilungsfiktion*), s.20(2) and s.20(4) GwG). The public register that is referenced must, however, be complete and accurate.

Before assessing the specific transparency register requirements, it is necessary to identify the beneficial owners of a company:

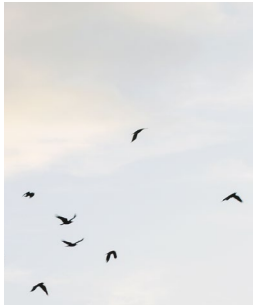
- First, one needs to assess whether one or more natural person(s) each **directly holds more than 25% of the shares**, controls more than 25% of the **voting rights** or exercises a **controlling influence over the company within the meaning of s.290(2)-(4) German Commercial Code (*Handelsgesetzbuch*, „HGB“) and s.19(3)(1)(b) GwG**. If this is the case, there is an irrebuttable presumption that these persons exert control over the company and they are deemed to be beneficial owners within the meaning of the transparency register (s.19(2) first sentence and s.3(2) GwG).
- If the company is not directly controlled by a natural person, it should then be assessed whether there are persons **indirectly holding more than 25% of the shares or voting rights in, or exerting a controlling influence over, the company**. The different forms of shares and voting rights that a person holds may be aggregated for these purposes. If, however, an intermediate company holds an interest in the company to be assessed and there is in turn a natural person behind that intermediate company, the shares and voting rights of the intermediate company may be attributed to that natural person only if the natural person holds a majority share in, or exerts a controlling influence over, the intermediate company (s.3(2) second sentence GwG).
- In cases of doubt where even after a comprehensive review, in some circumstances of complex chains of ownership, no beneficial owner can be determined based on the principles described above, the **legal representative, managing shareholder or managing partner** of the company shall be deemed to be the beneficial owner (s. 3(2) fifth sentence GwG). Normally, this person will already have been entered in a public register, meaning that in such cases no additional information would need to be notified to the transparency register. This rule will be applicable in particular to companies with a fragmented shareholder base.

Disclosure and registration obligations of companies and shareholders

Registrations can be made online at www.transparenzregister.de.³ As of 1 October 2017, the transparency register must include, directly or via a link to a public register,⁴ the surname, first name, date of birth, place of residence, as well as the nature and scope of the economic interest of all beneficial owners of a company (s.19(1) and s. 59(1) GwG). In

³ Cf. German Regulation on the transfer of data by persons subject to a duty of notification and by the operator of the company register to the transparency register (German Regulation on the transfer of data to the transparency register (*Transparenzregisterdatenübermittlungsverordnung*, „TrDüV“)), Federal Law Gazette I/2017, p.2090.

⁴ Cf. German Regulation on the transfer of index data of the State (Land) judicial administration to the transparency register (German Index data transfer regulation (*Indexdatenübermittlungsverordnung*, „IDÜV“)), Federal Law Gazette I/2017, p.2372.



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order to ensure the necessary level of transparency regarding the nature and scope of the economic interest, details of the level of shareholding, voting rights or any shareholder agreements have to be entered in the transparency register (s.19(3) GwG).

Unless the assumed disclosure rule applies (see above, s. 20(2) and 20(4) GwG), the required information has to be notified in two stages: firstly by the shareholders to the company and secondly by the company to the transparency register.

The notification obligation applies to shareholders who themselves are beneficial owners or who are directly controlled by the beneficial owner (s. 20(3) GwG). It is irrelevant in this context whether the shareholders are natural persons or legal entities. The shareholders must provide the required information to their company and, where necessary, notify any changes to this information without undue delay. If the shareholders are only indirectly controlled by the beneficial owner, the beneficial owner is obliged to notify the required information. This provision is intended to help avoid costly analyses in the case of complex chains of ownership, whilst ensuring complete and comprehensive notifications to the companies.⁵

The **company** is obliged to obtain, preserve, maintain and notify the registrar without undue delay of the information to be recorded in the register (s.20(1) GwG). Companies must merely obtain, preserve and provide the relevant information to the registrar to the extent that such information has to be entered in the transparency register. Failure to comply with the duty to obtain the information is subject to draconian fines. On the one hand, a duty to investigate the facts should be avoided.⁶ On the other hand, however, companies are required to take appropriate internal organisational measures and, for example, put in place effective monitoring and reporting systems, in order to ensure that the information notified to the transparency register is complete and accurate.⁷

Inspection rights of public authorities and third parties; naming and shaming

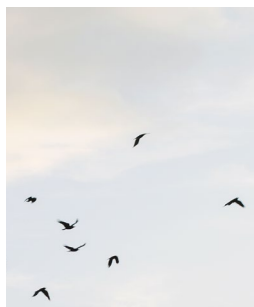
As of 27 December 2017, in particular supervisory and law enforcement authorities will be authorised to inspect the transparency register. Third parties will also be permitted to inspect the register if they can demonstrate a legitimate interest (s.23(1) and s. 59(3) GwG). According to the explanatory memorandum, specialised journalists and non-governmental organisations will in particular be able to claim a legitimate interest if their work relates to combatting money laundering, corruption or terrorism financing.⁸ Third parties with a right of inspection will not, however, have access to information about the exact place of residence or the date of birth of the beneficial owner (s.23(1) second sentence GwG).

⁵ Explanatory memorandum, Bundestag publication 18/11555, pp.129 *et seq.*

⁶ Explanatory memorandum, Bundestag publication 18/11555, p.127.

⁷ According to the explanatory memorandum, companies „must review at least annually whether they have otherwise obtained information indicating a change in the beneficial owners that has to be reflected in the underlying documentation and notified to the transparency register. Imputed knowledge regarding the information is however not sufficient.“, explanatory memorandum, Bundestag publication 18/11555, p.127.

⁸ Explanatory memorandum, Bundestag publication 18/11555, p.133.



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The beneficial owner may apply to the registrar for a restriction of third party access to the register. The beneficial owner has to be able to demonstrate an overriding interest worthy of protection. Such an overriding interest is deemed to exist if the beneficial owner is in danger of falling victim to certain crimes, is a minor or is without legal capacity (s.23(2) GwG).

Details of the fines imposed, type and nature of the infringement and those responsible will be published on the website of the supervisory authority (so-called “naming and shaming”, s.57 and s.50 GwG).

Summary and Outlook

By **1 October 2017**, an analysis should be conducted of the relevant beneficial owners of each (group) company (except for partnerships under the German Civil Code and listed companies). An entry in the transparency register will only be necessary if the required information about the beneficial owners is not already available from public registers. An incorrect assessment may result in significant fines.

In our practice, we have already been faced with issues that are not clearly addressed in the new German Anti-Money Laundering Act:

- We currently assume that companies with their registered office abroad and a **branch in Germany** that is registered in the German commercial register will not be required to be entered in the transparency register (cf. s.20(1) GwG).
- We consider that in accordance with the rule in case of doubt pursuant to s. 3(2) fifth sentence GwG the beneficial owner of a German limited partnership (GmbH & Co. KG), whose general partner with powers of representation and management is the limited liability company (GmbH) and thus not a natural person, would be its managing director (who is normally already entered in the German commercial register).

The European Commission has already proposed a directive amending the Fourth EU Directive on Anti-Money Laundering in July 2016.⁹ The proposal *inter alia* provides for a lower threshold regarding the irrebuttable presumption of economic control, of 10% instead of 25%, with regard to certain risky companies, and for enhanced rights of the general public to inspect the transparency register. It remains to be seen how the legislative process will progress in future.

⁹ 2016/0208 (COD).

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