

GERMAN TRANSPARENCY REGISTER ON BENEFICIAL OWNERSHIP: NEW FILING REQUIREMENTS FOR GERMAN CORPORATIONS AND FOREIGN ENTITIES DIRECTLY OR INDIRECTLY ACQUIRING GERMAN REAL ESTATE

To Our Clients and Friends:

In order to meet the technical requirements for the upcoming interconnection of the EU Member States' national registers holding beneficial ownership information via a European central platform, the German lawmaker made some elemental changes to the provisions on the German transparency register^[i], which will result in new filing requirements for numerous German legal entities and registered partnerships (see section 1. below). The new filing requirements with the German transparency register will apply in addition to any filing requirements with other public registers such as, e.g., the commercial register, and will also apply to listed companies and their subsidiaries. Moreover, the obligations of foreign entities to file beneficial ownership information for registration in the German transparency register are significantly expanded, in particular, to capture share deals involving real estate located in Germany (see section 2. below).

The new regulations will take effect as early as 01 August 2021. However, German legal entities and registered partnerships, which will have to file beneficial ownership information with the transparency register for the first time solely due to the new rules, benefit from transitional periods, with filing deadlines that – depending on the type of entity – will expire only on 31 March 2022, 30 June 2022 or even 31 December 2022. The new filing obligations for foreign entities directly or indirectly acquiring real estate located in Germany, however, will take effect immediately on 01 August 2021. German notaries are obliged to ascertain that any such filing obligations with the transparency register have been complied with, and they must refuse notarization in case of non-compliance with the filing obligations. Foreign entities planning to acquire (directly or indirectly) real estate located in Germany thus are strongly advised to ensure that the required beneficial ownership information is filed with the German transparency register in due time prior to the scheduled signing date in order not to risk a delay of their transaction because the German notary refuses notarization. Furthermore, significant administrative fines may be imposed if the filing requirement is not complied with.

1. German legal entities and registered partnerships

Current Status

Since 2017, legal entities (*juristische Personen*) under German private law and registered partnerships have been required to file beneficial ownership information for registration in the German transparency register. To prevent double filings to multiple registers, this filing obligation is deemed fulfilled if the

relevant beneficial ownership information is available in electronic form in certain other German registers, e.g., in shareholders lists retrievable via the German commercial register (“notification fiction”) (§ 20 (2) sentence 1 of the German Anti-Money Laundering Act (*Geldwäschegesetz – GwG*)). In addition, with respect to corporations listed on regulated markets with adequate transparency requirements with regard to voting rights, no filing of beneficial ownership information with the transparency register is required for the listed corporation and even its subsidiaries if the chain of control up to the listed parent company is traceable via documents and information stored in electronic form in German registers (so-called “unconditional notification fiction”, § 20 (2) sentence 2 GwG). As a result of these notification fictions, an excerpt from the German transparency register often does not reveal the names of beneficial owners, and further complex and cumbersome analysis is required in order to chase down, via various public registers, the persons ultimately owning or controlling the relevant legal entity or registered partnership.

New Regulations

Effective 01 August 2021, the notification fictions of § 20 (2) GwG will be abolished in total. As a result, every legal entity under private German law and registered partnership under German law will not only be required to collect information on their beneficial owners, to store such information and to keep such information up to date, but will also be required to file such beneficial ownership information for registration with the German transparency register. If there is no natural person who directly or indirectly ultimately owns or controls the legal entity or partnership, the legal representative, managing shareholder or partner of the legal entity or partnership must be filed as “fictional beneficial owners” for registration with the transparency register; the fact that the relevant legal representatives are already registered in the commercial register (or another recognized public register, respectively), will no longer be sufficient. There will be an exemption only for not-for-profit registered associations (such as, e.g., sport and music clubs) for which the register-keeper, the Federal Gazette, will file the beneficial ownership information based on the data available in the German association register.

The definition of a beneficial owner remains essentially unchanged – in particular, as now, in case of a legal entity (other than associations capable of holding rights) every natural person holding or controlling, directly or indirectly (via a controlled legal entity) more than 25 per cent of the capital, more than 25 per cent of the voting rights or exercising control in a comparable way qualifies as a beneficial owner. However, with regard to the beneficial ownership information, in the future not only one nationality but all nationalities of the beneficial owners must be filed for registration; according to the explanatory memorandum, however, it shall be sufficient that missing relevant information on further nationalities is filed in due course as part of updates.

The new filing obligations will affect numerous German legal entities and registered partnerships, especially including German subsidiaries of groups with listed or widely held parent holdings, which so far have often profited from the notification fictions of § 20 (2) GwG. At least, the Act provides for relatively generous staggered transitional periods for the German entities and registered partnerships that are required to file beneficial ownership information for the first time solely due to the cancellation of the notification fictions of § 20 (2) GwG:

- for stock corporations (*Aktiengesellschaft – AG*), European stock corporations (*Societas Europaea – SE*) and limited partnerships limited by shares (*Kommanditgesellschaft auf Aktien – KGaA*) until 31 March 2022;
- for limited liability companies (*Gesellschaft mit beschränkter Haftung – GmbH*), cooperatives (*Genossenschaften*), European cooperatives (*Europäische Genossenschaften*) or partnerships (*Partnerschaften*) until 30 June 2022; and
- for all other obliged legal entities and registered partnerships until 31 December 2022.

In addition, administrative fines for failure to file beneficial ownership information triggered by the new rules shall not be imposed for a transitional period of one year following the expiry of the corresponding filing deadlines.

2. Foreign entities directly or indirectly acquiring German real estate

The real estate sector in general is considered particularly vulnerable to money laundering, and, especially, German real estate is attractive for not only national but also international criminals.

As a consequence, since 2020 foreign entities (i.e., entities having their headquarters abroad) that undertake to acquire real estate in Germany by way of an asset deal have been required to file beneficial ownership information with the German transparency register. The German notary recording the real estate transaction must ascertain that the filing obligation has been complied with or otherwise refuse notarization, which effectively prevents the acquisition as real estate purchase agreements under German law must be notarized to be effective.

From 01 August 2021, the obligations of foreign entities to collect, keep up-to-date, and file information on their beneficial owners with the German transparency register are further expanded to also cover share deals and other transaction structures resulting in an indirect acquisition of German real estate. In the future, the obligation for foreign entities to file beneficial ownership information with the German transparency register will thus be triggered if a foreign entity

- undertakes to acquire real estate located in Germany (asset deal);
- directly or indirectly acquires at least 90 per cent of the capital of a German or foreign corporation holding real estate located in Germany (share deals triggering German real estate transfer tax in accordance with § 1 (3) German Real Estate Transfer Tax Act (*Grunderwerbsteuergesetz*)), or
- directly or indirectly acquires a beneficial interest of at least 90 per cent of the capital of a (German or foreign) corporation holding real estate located in Germany (transactions triggering German real estate transfer tax in accordance with § 1 (3a) German Real Estate Transfer Tax Act).

The details of the new filing obligations in case of share deals and other transaction structures are still unclear. Hopefully, explanatory guidelines concerning the interpretation of these new filing obligations will be published by the German Office of Administration (*Bundesverwaltungsamt*) in due time.

Exemptions from the filing obligations to the German transparency register apply if the foreign entity has already filed the relevant beneficial ownership information to another EU Member State's register on beneficial ownership.

The new regulations provide for a similar expansion of the filing obligations for trustees with residence or legal headquarters outside of the European Union if they wish to acquire (directly or indirectly) real estate located in Germany (§ 21 (1) sentence 2 GwG new version).

[i] Act for the European interconnection of the transparency registers and for transforming Directive (EU) 2019/1153 of the European Parliament and the Council of 20 June 2019 for the use of financial information to combat money laundering, terrorist financing and other serious crimes (Transparency Register and Financial Information Act) of 10 June 2021 (*Gesetz zur europäischen Vernetzung der Transparenzregister und zur Umsetzung der Richtlinie 2019/1153 des Europäischen Parlaments und des Rates vom 20. Juni 2019 zur Nutzung von Finanzinformationen für die Bekämpfung von Geldwäsche, Terrorismusfinanzierung und sonstiger schwerer Straftaten (Transparenzregister- und Finanzinformationsgesetz) vom 10. Juni 2021*).



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. For further information, please feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the team in Frankfurt or Munich, or the following authors:

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