

13 December 2019

TRANSPARENCY REGISTER

The Transparency Register (<https://www.transparenzregister.de>) is an electronic register which is designed to provide information about the beneficial owners of businesses. The duty to create “transparency” and the imposition of fines in the case of violations is designed to hinder the concealment of illegal assets with the aid of complex corporate structures.

Since October 2017, legal representatives of legal persons under private law (including foundations with legal capacity) and registered partnerships (see sec. 20 (1) German Money Laundering Act (GwG)) as well as trustees and *Treuhänder* of certain foundations without legal capacity and of comparable legal arrangements (see sec. 21 (1) and (2) GwG) have been required to disclose the relevant beneficial owners to the Transparency Register without delay. This does not apply if such information is already available from other public sources (e.g. commercial register) specified in sec. 22 (1) in connection with sec. 20 (2) GwG.

It is likely that many persons who are required to provide such information are unaware of their duty to do so or that the obligation has not yet been met for other reasons.

In the meantime, however, the Federal Office of Administration is increasingly sending letters requesting a “**hearing regarding an administrative offence (sec. 55 OWiG)**” to the legal representatives of limited companies and partnerships required to make notifications and to other relevant legal persons and other associations of persons and funds.

Focus on unlisted stock corporations (*Aktiengesellschaften*) and GmbH & Co. KGs

At the present time, the focus is evidently on the legal representatives of stock corporations not listed on a regulated market and on GmbH & Co. KGs in particular.

In the case of stock corporations, it is not possible to determine who the beneficial owners are on the basis of a list of shareholders submitted to the commercial register, even though this is generally possible for GmbHs. If the stock corporation is only traded on open market, but not even listed on the regulated market in terms of sec. 2 (11) of the Securities Trading Act (*Wertpapierhandelsgesetz*), the practical exemption in sec. 20 (2) sentence 2 GwG does not apply either.

In the case of GmbH & Co. KGs, the Federal Office of Administration has recently taken the view that the entry in the commercial register of the amounts for which the limited partners are liable does not simultaneously indicate their interests in the partnership capital. It argues that beneficial ownership can therefore also not be determined on the basis of the entries.

We refer in this regard to the **letter attached hereto from the Federal Office of Administration dated 04 November 2019 addressed to the Hamburg Chamber of Tax Consultants.**

GmbHs

However, managing directors of GmbHs that have older lists of shareholders in the commercial register that cannot yet be retrieved electronically should also take action. This should apply especially to GmbHs that were registered prior to 2007 and that have not altered their shareholder lists since 2007.

Moreover, the exemption can only apply if the information about the shareholders in the list is up-to-date and comprehensive. The information must be subject to a detailed examination. The same also applies to multi-layered chains of shareholdings.

Beneficial owners

The information regarding the beneficial owner of such associations must be regularly updated. For legal persons (except for foundations with legal capacity) or other companies, in particular every natural person that directly or indirectly more than 25 percent of the capital or controls more than 25 percent of the voting rights or exercises control in a comparable manner is a beneficial owner.

If there is no beneficial owner according to the above definition or if the parties that are required to make notifications are unable to determine the beneficial owner in selected cases, there is a duty to disclose the so-called “deemed” beneficial owner.

Tightening of the GwG as of 01 January 2020

On 29 November 2019, the Bundesrat approved the Law to Transpose the Directive amending the Fourth EU Money Laundering Directive passed by the Bundestag on 14 November 2019, and thus amended and tightened the Money Laundering Act (GwG) in several respects.

The amended Money Laundering Act will come into force at the start of 2020.

Need to take action prior to the end of 2019 / Internet disclosure starting in 2020

According to the Federal Office of Administration, which is responsible for maintaining the register, (ongoing) violations of the duty to notify could, among other things, in practical terms lead to higher fines and publication in the internet in 2020. It is therefore advisable to provide information about beneficial owners that is missing in the Transparency Register in 2019.

However, fines will, as a rule, probably also be reduced even in the case of later notifications.

If you have any questions, please contact us.

The Transparency Register also offers a free service number (0800-1 23 43 37) from Monday to Friday and from 8:00 to 18:30.

You can find more information through the following links:

- Transparenzregister - Die offizielle Plattform der Bundesrepublik Deutschland für Daten zu wirtschaftliche Berechtigten
<https://www.transparenzregister.de/treg/de/start;jsessionid=AF7B4879CFafa2800C1C69A1899A0DFA.app22?0>
- Hinweisblatt zur Mitteilungspflicht an das Transparenzregister
https://www.hannover.ihk.de/fileadmin/data/Dokumente/Themen/Dienstleistungen/Geldwaesche/Hinweisblatt_Transparenzregister.pdf
- Rechtshinweise zur Einreichung - Fragen und Antworten des Bundesverwaltungsamts
<https://www.hannover.ihk.de/fileadmin/data/Dokumente/Themen/Dienstleistungen/Geldwaesche/Rechtshinweise-BVA-1.pdf>
- Kurzanleitung für die Beauftragung von Mitteilungen wirtschaftlich Berechtigter im Transparenzregister
https://www.transparenzregister.de/treg/de/Kurzanleitung_Transparenzregister.pdf
- Häufig gestellte Fragen zum Transparenzregister
<https://www.transparenzregister.de/treg/de/KurzanleitungTransparenzregister.pdf>
- Webinare des Bundesanzeiger-Verlages zum Transparenzregister
<https://www.requis.de/betrifft-unternehmen/seminare/webinare-zum-transparenzregister.html>
- FAQs Gebühren, Prüfung der Daten, Meldefristen und Sanktionen
https://www.bva.bund.de/DE/Das-BVA/Aufgaben/T/Transparenzregister/FAQ/FAQ-Gebuehren-Daten/Gebuehren_Daten_node.html

Letter of the Federal Office of Administration (*Bundesverwaltungsamt*) dated 04 November 2019 to the Hamburg Chamber of Tax Consultants

Law to Implement Directive (EU) 2018/843 amending the Fourth EU Anti-Money Laundering Directive (EU) 2015/849

Dear Sir / Madam,

Since October 2017, legal persons under private law and registered partnerships, among others, have been required to inform Bundesanzeiger Verlag GmbH, which is responsible for maintaining the Transparency Register, electronically via www.transparencyregister.de about their beneficial owners for entry in the Transparency Register. Violations of this and other duties under the German Money Laundering Act (GwG) may result in the imposition of considerable fines on the associations. We therefore point out that late notification will lead to a considerably lower fine than failure to notify. According to the Federal Office of Administration's schedule of fines, the fine for failure to notify is five times higher.

Regardless of the significant fines, non-appealable decisions to impose fines due to violations of the duty to notify will have to be published online as of January 2020 in accordance with sec. 57 GwG as amended (subject to the entry into force of the above implementing law). This provision implements EU law.

For the affected associations and responsible managers, this can have serious consequences in connection with national and international legal and business transactions.

Publication can be averted if beneficial ownership is reported in 2019. The Federal Office of Administration takes the view that the duty to disclose beneficial ownership does not apply to violations that ended prior to 2020.

In the interest of affected businesses which are clients of yours, we would ask you to pass on and disseminate the information about the Transparency Register and the impending publication of violations without delay.

Moreover, we would draw your attention to the following legal views of the BVA and in particular the main amendments to the law:

1) Nationality

In the future, the nationality of the beneficial owners must also be disclosed in the Transparency Register (sec. 19 (1) GwG as amended) unless the deemed notification according to sec. 20 (2) GwG as amended applies.

2) Duty to determine beneficial ownership and provide documentation

If an association has received no information about its beneficial owners (under sec. 20 (3) GwG), it must request from its owners, if they are known to it, a reasonable amount of information about the association's beneficial owners. The association must document the requests for information and information obtained (sec. 20 (3a) GwG as amended). Violations are punishable by fines.

3) Reports about inconsistencies

If, under the GwG, especially obliged entities under sec. 23 (1) sentence 1 no. 2 GwG as amended determine inconsistencies between the information about beneficial owners that is available in the Transparency Register and the information and knowledge about the beneficial owners available to them, this must be notified without delay to the office that maintains the register.

Inconsistencies must be assumed if entries under sec. 20 (1) and (2) GwG and under sec. 21 (1) and (2) GwG are missing, individual details about the beneficial owners under sec. 19 (1) GwG differ or if different beneficial owners are determined.

4) Inspection of the Transparency Register

Under sec. 23 (1) sentence 1 no. 3 GwG as amended, all members of the public will be entitled to inspect the register in the future. Evidence of a legitimate interest is no longer required from 2020 onwards. However, the persons inspecting the register will still be identified and a fee for inspection will still be charged.

5) Duty to notify in the case of GmbHs with no electronic list of shareholders

For a GmbH/UG, the deemed notification under sec. 20 (2) GwG will not apply unless the list of shareholders or the standard formation record in the commercial register can be retrieved electronically. However, for GmbHs formed prior to 2007 this is normally not the case.

Accordingly, notification to the Transparency Register or the electronic publication of the list of shareholders via the commercial register is essential if natural persons indirectly or directly control more than 25% of the shares or voting rights.

6) Duty to notify in the case of limited partnerships

The deemed notification under sec. 20 (2) GwG applies to limited partnerships only in exceptional cases. The reason is that the current printout of the commercial register shows only the liable amounts of the limited partners within the meaning of sec. 171 HGB (German Commercial Code), but not their compulsory contribution (= capital shares). The liable amounts and capital shares may diverge very considerably. In addition, without knowledge of the general partner's interest in the capital, which is also not entered in the commercial register, it is impossible to determine the percentage interests of the limited partners.

You can find further explanations about legal questions concerning the Transparency Register in BVA's FAQs

https://www.bva.bund.de/SharedDocs/Downloads/DE/Aufgaben/ZMV/Transparenzregister/Transparenzregister_FAQ.pdf

Yours sincerely

Federal Office of Administration