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URL: http://mobile.deloitte-tax-news.de/german-tax-legal-news/transparency-register-exceptions-and-legal-fiction-of-notification.html

15.05.2018

German Tax and Legal News

Transparency Register: exceptions and legal fiction of notification

Since October 1, 2017, German companies are required to disclose their beneficial owners by way of notification to the Transparency Register. This article discusses relevant practical constellations in which such notification is not required due to exceptions or legal fiction of notification.

Since October 1st, 2017, German companies are required to report their beneficial owner(s) to the electronic Transparency Register. Beneficial owner of a company is, briefly speaking, the individual (or, in legal terms, the natural person) who owns or controls the company - directly or indirectly. With the introduction of the Transparency Register and the threat of sanctions for failure to comply with reporting obligations, the legislator has created far-reaching compliance obligations, which the parties must review at least once a year (BT-Drs. 18/11555, S. 127). The provisions in sec. 18 et seq. of the German Anti-Money Laundering Act (GwG), which were introduced in order to implement the 4th Money Laundering Directive (EU) 2015/849, are challenging even to legal professionals. Notwithstanding the complexity of the matter, compliance with the registration requirements is highly advisable in order to avoid severe fines. The good news is: Not every company needs to take action. Certain legal forms are exempted from the disclosure requirements. Under certain conditions, a company is considered to comply with the requirements even without notification to the Transparency Register (fiction of notification). This article discusses practical constellations in which this is precisely the case.

Civil Law Partnerships (GbR)
Civil law partnerships (*Gesellschaft bürgerlichen Rechts, GbR*) pursuant to the German Civil Code *(Bürgerliches Gesetzbuch, BGB*) are not required to register in the Transparency Register.

Foreign Companies
Companies that are only a branch office or a legally dependent business establishment of a foreign company in Germany are also exempted from the requirements to register with the Transparency Register.

Note: For foreign companies within the EU, it is likely that a notification requirement exists under the foreign jurisdiction in its implementation of the 4th Money Laundering Directive (EU) 2015/849.

Fiction of Notification: Listed Corporations
Certain listed corporations, namely those corporations listed in an organized market in the sense and meaning of sec. 2 para. 11 of the German Securities Trading Act (*Wertpapierhandelsgesetz, WpHG*), or those subject to transparency requirements regarding the percentage of voting rights or other international standards equivalent to EU-law, are considered to automatically fulfil their notification requirements (fiction of notification).

Fiction of Notification: Commercial Register & Co.
The requirement to notify information regarding the beneficial owners in the Transparency Register is considered to be fulfilled if this information is already electronically retrievable in the Commercial Register (*Handelsregister*), the Partnership Register (*Partnerschaftsregister*), the Register of Cooperatives (*Genossenschaftsregister*), the Register of Associations (*Vereinsregister*) or the Company Register (*Unternehmensregister*). If and where this is the case, additional registrations with the Transparency Register are dispensable.

Relevant constellations include the following:

- A limited liability company (*Gesellschaft mit beschränkter Haftung*, *GmbH*) is solely held by individuals. These are, in accordance with the relevant provisions of the Limited Liability Companies Act *(GmbHG*), listed in the list of shareholders, which can be

retrieved electronically in the Commercial Register. No other individuals directly or indirectly hold shares in or exercise control over the company.

- The fiction of notification also applies to companies which, contrary to the requirement in sec. 40 GmbHG (as amended on June 27, 2017), have not disclosed the respective percentage of the stake in the nominal capital held by each shareholder. This has been confirmed by the Federal Office of Administration (*Bundesverwaltungsamt*).

- A limited partnership with a limited liability company as a general partner (*GmbH & Co. KG*), provided that all limited partners are individuals who are registered in the Commercial Register and further provided that all shares in the GmbH acting as general partner are held by the GmbH & Co. KG itself (*"Einheitsgesellschaft"*) or individuals and no other individuals directly or indirectly hold shares in or exercise control over the GmbH.

- Multilevel structures, in which the individual German companies are for 100% held by the superordinate German companies (sub-subsidiaries held by direct subsidiaries held by the parent company) and where the beneficial owners are discernible by an overall review of the information given in electronic registers. This does not apply to registers in other jurisdictions, since these are not mentioned in sec. 20 para. 2 GwG. Indirect subsidiaries are exempt from the notification requirement by way of fiction, if the beneficial owner is discernible from register entries of the indirect, the direct subsidiary as well as the parent company. The direct subsidiary can be exempt if the beneficial owner is discernible from the register entries of the parent company. The parent company can be exempt, if its beneficial owner can be determined from its own register entries (see above).

If the beneficial owner cannot be determined or does not exist, the legal representative or the managing partner is deemed to be the beneficial owner of the company (sec. 3 para. 2 sentence 5 GwG). This so-called ficticious beneficial owner must also be notified to the Transparency Register. The notification may also apply for the fictitious beneficial owner, namely if he is duly registered with one of the aforementioned electronic registers. This is likely to apply in a large number of cases, as the managing directors of a company are regularly entered in the electronic Commercial Register (e.g. the managing director of a GmbH).

Note: The notification fiction only applies if and to the extent that all necessary information on the beneficial owners can be retrieved electronically from one of the registers. Information that exists in the Commercial Register but cannot be retrieved electronically is not taken into account. Care must be taken to ensure that the register contains the first and last name, date of birth, place of residence, as well as the nominal amounts and the serial numbers of the shares held by each shareholder. It should also be noted that the notification fiction does not apply if agreements that are not apparent from the register, but are relevant to the beneficial owner, such as voting agreements, trusteeship agreements, etc. exist.

Conclusion

There are significant practical exceptions to the notification requirements to the Transparency Register pursuant to sec. 18 et seq. GwG. Certain legal forms, such as the German civil law partnership or GbR, as well as branch offices or legally dependent business establishments of foreign companies, are completely exempted from the obligation to report to the Transparency Register. In case of certain listed companies, a notification requirement is considered to be fulfilled by way of fiction of notification. Furthermore, a fiction of notification applies if all information on the beneficial owners can already be retrieved electronically from the Commercial Register, the Partnership Register, the Register of Cooperatives, the Register of Associations or the Company Register. If a beneficial owner cannot be determined, the legal representative or the managing partner is regarded as the beneficial owner (so-called fictitious beneficial owner).

In the case of more complex group structures, voting, pool and consortium agreements, the determination of the beneficial owner or whether exceptional or fictitious circumstances take effect can be tedious. The still relatively new provisions on the Transparency Register in numerous case constellations also raise many unresolved legal questions. The registration process itself, on the other hand, is relatively straightforward and free of charge. It can be carried out at www.transparenzregister.de. If there are doubts about the taking effect of exceptional or fictitious facts, it is therefore better to report too much than too little to the

Transparency Register. In the words of the legislator: “Overfulfilment is harmless” (BT-Drs. 18/11555, S. 128).

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