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Further Tightening of Transparency Obligations in Germany

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I. Introduction

Against the backdrop of the European strategy to further improve the fight against money laundering and terrorist financing and, in particular, to create transparency about the ultimate beneficial owners (the "UBO"), the German Federal Government has introduced a draft Act on the Transparency Register and on Financial Information (*Transparenzregister- und Finanzinformationsgesetz*) in February 2021. The draft provides for a remodeling of the German transparency register and broadens German companies' transparency obligations. The draft extends the obligation to register the UBO of non-German investors if they acquire, directly or indirectly, real estate in Germany (e.g., acquiring a German company owning real estate).

II. Key Takeaways

No more legal fiction of the fulfillment of transparency duties

The draft provides for an upgrade of the German transparency register to a full register; incorporating information from other registers by reference will no longer be permissible. The legal fiction of the fulfillment of notification duties shall no longer apply.

Under the current rules, entities whose beneficial owners can be determined from other German registers (in particular, the commercial register) are exempted from the duty to notify information on the beneficial owners for entry into the transparency register. Such exemption works by way of a legal fiction; if the information on the beneficial owners of the respective entity is contained in electronically accessible documents and entries in the other registers, the notification duty is deemed fulfilled. The obligation to notify the transparency register is also deemed fulfilled for companies that are listed on an organized market.

In the future, every German company, including those listed on an organized market, will be required to report their beneficial owners to the transparency register, without exception. .

New reporting obligations in case of share deals of foreign companies in relation to German real property companies

Under the current rules, foreign companies that are not registered in a transparency register of another EU member state are obliged to report their beneficial owners to the transparency register if they attempt to acquire (direct) ownership of real property in Germany. According to the draft, this obligation to report the beneficial owners to the German transparency register will be extended, under certain circumstances, to the acquisition of shares in a company that holds real property in Germany (share deal). For instance, if a foreign company acquires at least 95% of the shares in a German limited liability company, and such company owns real property in Germany, the foreign

company will be obliged to notify and inform the transparency register on its beneficial owners (unless such foreign company is already registered in a transparency register of another EU member state).

Additional information on beneficial owners required

While it is currently sufficient to report one of several nationalities of a beneficial owner, the draft law provides that, in the future, all nationalities of a beneficial owner must be reported (in addition to the beneficial owner's first name and surname, birth date, and place of residence).

III. Practical Implications

The amendments will result in considerable additional work for German businesses. Not only will many companies have to report their beneficial owners to the transparency register for the first time, they will also be required to check their entries on an ongoing basis and update them in the event of any changes.

In addition, the obligations for a foreign investor to be registered in the transparency register if it is acquiring a German company owning real estate in a way that real estate transfer tax is triggered, should be considered, in particular as a registration could take a considerable amount of time.

The draft provides for the law to enter into force on August 1, 2021, but grants transition periods (e.g., until March 31, 2022 for German stock corporations, and until June 30, 2022 for German limited liability companies) for the reporting of beneficial owners of companies required to report for the first time on the basis of the planned provisions.

Non-compliance with the reporting obligations may result in severe fines (up to €1 million or twice the economic benefit derived from the contravention). These fines may be imposed on either the German company or its management or the UBO who does not fulfill his duty to notify the German company of the information required by it to fulfill its reporting obligations. It has to be assumed that the competent authority will increasingly enforce the reporting obligations once the new law has been passed.

IV. European Background

European platform of transparency registers

European law (Directive (EU) 2018/843 of May 30, 2018, also referred to as the 5th EU Money Laundering Directive) provides for the interconnection of the transparency registers of the EU member states. A European platform will be set up by which all the data contained in the national transparency registers will be accessible.

According to the German Federal Government, the amendments proposed in the current draft law aim to improve the quality of entries in the transparency register in order to make it fit for the future European network of transparency registers. The draft explicitly mentions that the current form of the German transparency register does not fully allow the interconnection of the transparency registers of the EU member states as required by European law. The German legislature deliberately designed the transparency register as a catch-all register when it was introduced in 2017, even though the future interconnection of European transparency registers was already foreseeable at that time.

No harmonized rules on beneficial owners across the European Union

It should be noted that the substantive provisions on the beneficial owners have not been harmonized across Europe. Therefore, an individual stated in a foreign transparency register is not necessarily a beneficial owner under German law. For instance, a German entity inspecting other

European transparency registers via the European platform in order to identify a foreign EU contracting party can find details on beneficial owners of that contracting party, but such beneficial owners have been determined according to the laws of the foreign jurisdiction, which may deviate from the German regulations. Consequently, as long as the laws on the determination of beneficial owners are not fully harmonized, the German entity cannot rely on the details contained in the foreign register to be consistent with a beneficial owner analysis according to German law.



If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Frankfurt lawyers:

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