

February 2022

RECENT AMENDMENTS OF THE GERMAN TRANSPARENCY REGISTER REGIME WITH RESPECT TO LISTED COMPANIES.

An amendment of August 1, 2021 to the German Anti-Money Laundering Act (GwG) eliminates the statutory exemption previously enjoyed by listed companies and obliges them and their German subsidiaries to disclose their beneficial owners to the transparency register. Against the backdrop of legislative inconsistencies, it is still subject to uncertainty how this notification is to be made. Nevertheless, there is an immediate need for action, because listed companies must comply with notification obligations by March 31, 2022 at the latest in order to avoid the risk of fines.

Under the old legislation, listed companies enjoyed the benefit of an exemption from the obligation to notify their beneficial owners due to a "fictitious notification" under Sec. 20 (2) sentence 2 GwG (old version). The exemption indirectly applied to German subsidiaries of foreign listed companies under certain circumstances. This exemption ceased to apply on July 31, 2021. After expiry of a transitional period on March 31, 2022, listed companies will hence be obliged to submit the relevant information.

However, due to legislative inconsistencies, in particular the fact that the legislator did not abolish Sec. 3 (2) sentence 1 GwG (a provision stating that the 25% control threshold for anti-money-laundering purposes does not apply to listed companies), there is considerable legal uncertainty as to the criteria according to which the beneficial owners of listed companies are now to be determined.

There are various approaches to this issue in literature. In our opinion, due to the inapplicability of Sec. 3 (2), the general control test established by Sec. 3 (1) GwG should be applied. According to this test, beneficial ownership of listed companies by a natural person exists if such person (or several persons acting in con-

cert) can directly or indirectly exercise a controlling influence as defined in Sec. 290 (2) to (4) of the German Commercial Code (HGB) on the listed company.

Examples of controlling influence: The natural person

- holds more than 50% of the voting rights or
- has the right to appoint or remove the majority of the members of the management or supervisory body of the listed company, or
- is entitled to determine the financial and business policy of the company based on a control agreement or a provision of the Articles of Association.
- Whether legally or contractually agreed veto or consent rights also lead to a controlling influence within the meaning of Sec. 3 (2) sentence 4 GwG in conjunction with Sec. 290 (2) to (4) of the German Commercial Code (HGB) is highly controversial.

If the shareholding or such controlling influence is unclear, which can especially occur in multi-level or international shareholding or group structures, the law also establishes duties to make inquiries under Section 20 (3a) GwG. Pursuant to Sec. 20 (3a) Sentence 4 GwG, any inquiries must be documented in order to avoid possible sanctions (cf. Sec. 56 (1) No. 59, 60 GwG).

Effects for German subsidiaries of foreign listed companies

The above considerations also have implications for German subsidiaries of foreign listed companies. If no beneficial owner can be identified at the level of the listed company, the management body of the subsidiary will generally have to be reported as a fictitious beneficial owner pursuant to Sec. 3 (2) sentence 5 GwG. If, on the other hand, the listed company has beneficial owners, this will generally also affect the German subsidiary and will have to be reported to the transparency register accordingly. The deadlines for notification to the Transparency Register depend on the respective legal form of the subsidiary in accordance with Sec. 59 (8) GwG.

Immediately required steps

The notification to the transparency register is a compliance task. Management bodies of listed companies are therefore obliged to make the mandatory notifications to the transparency register by **March 31, 2022** at the latest. The same applies to subsidiaries, which in future will no longer be able to make use of the previous exemption; depending on the legal form, slightly longer transition periods may apply here (Sec. 59 (8) GwG).

The regularly revised FAQs of the Federal Office of Administration should be kept in mind so that any clarifications and explanations can be taken into account promptly in the notification obligations.

In the future, reviews of the notifications submitted will be required on an ad hoc and annual

basis in order to meet compliance responsibilities; sufficient documentation should be on file in this regard.

CLIENT BRIEFING

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