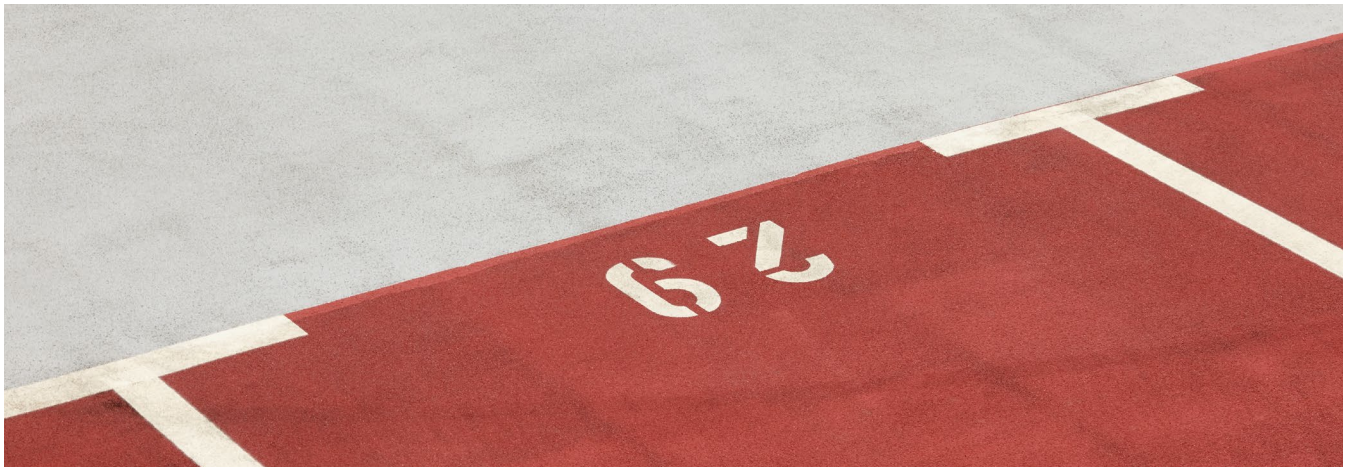

New Transparency Register obligations as of August 1, 2021

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With the Transparency and Financial Information Act ("TraFinG"), the legislator rejected the possibility of linking the Transparency Register with other publicly accessible registers, in particular the Commercial Register. Instead, undertakings will be subject to two notification obligations that are unrelated to each other. The changes will apply from August 1, 2021, and will trigger a need for action on the part of undertakings that should not be underestimated. Due to the discontinuation of the so-called "notification fiction", the register entries must be made in parallel. In doing so, strict synchronization of the contents must be ensured.

In addition, the Act on the Modernization of the Law on Partnerships ("MoPeG") will come into force on January 1, 2024. The MoPeG will permit and also require for certain legal transactions the registration of civil law partnerships ("GbR") in a new "Partnership Register" to be created. As a result, the GbR in the form of the "eGbR" will in future be one of the registered partnerships within the meaning of Section 20 (1) sentence 1 of the Money Laundering Act ("MLA") and as such must be entered in the Transparency Register.

I. From a catch-all register to a double register: Expanding the scope of the Transparency Register and comprehensive notification requirements

The Transparency Register was established in 2017 to combat money laundering and terrorist financing, for which the legislator also wants to involve "civil society" and thus the public.[1] The beneficial owners of undertakings are to be entered in the Transparency Register. This refers to those natural persons who own an undertaking or who control a legal

1 Law on the Implementation of the Fourth EU Money Laundering Directive, the Implementation of the EU Money Transfer Regulation and the Reorganization of the Central Financial Transaction Investigation Authority of June 23, 2017.

entity in a comparable manner. In the case of chains of shareholdings, it must be determined for each individual undertaking who its beneficial owners are.

The following information is required:[2]

1. Name and surname of the beneficial owners
2. Date of birth
3. Residence
4. Nature and extent of the economic interest
5. Nationality (in the future, for the sake of clarification: all nationalities of a beneficial owner[3]).

The concept of control under the MLA[4] is broadly defined. The beneficial owner is anyone who holds more than 25% of the capital shares in a company or controls more than 25% of the voting rights. In addition, the beneficial owner is anyone who exercises control "in a comparable manner", which can include a wide range of circumstances. In order to determine the beneficial owner of an undertaking, an examination of the individual case is therefore always necessary. If, despite comprehensive checks, no beneficial owner can be identified, for example in the case of free float companies, the legal representatives or, as the case may be, the managing partners are deemed to be fictitious beneficial owners. Trusts and comparable legal structures for fiduciary asset management will no longer be privileged over foundations: In future, beneficial owners will include any natural person who can directly or indirectly exercise a controlling influence on an association acting as settlor, trustee or protector or who has been designated as beneficiary of the legal structure.[5]

As a result of the amendments to the TraFinG, all legal entities and registered partnerships will in future have to provide information on their beneficial owners. The so-called "notification fiction" will no longer apply (for the background see 3.). For many undertakings, this is the first time they will have to register, even though they were already obliged to identify their beneficial owners. Some undertakings face the issue of transparency registers for the first time. These include (1.) foreign undertakings acquiring shares in a company with real estate holdings in Germany, and (2.) from January 1, 2024, civil law partnerships, provided they are entered in the Partnership Register yet to be established. For a third large group of cases, that of listed companies (3.), a notification requirement was initially also envisaged, but this was dropped at the last minute in the legislative process.

1. Foreign undertakings with real estate holdings in Germany

Associations domiciled abroad may also be required to disclose their beneficial owners to the German Transparency Register. This is the case if they undertake to acquire ownership of a property located in Germany *(asset deal)* or – new in this respect – if shares in an undertaking within the meaning of Section 1 (3) of the German Real Estate Transfer Tax Act ("GrEStG") are transferred to them *(share deal)*. Thus, every foreign undertaking is subject

2 Section 19 (1) MLA.
3 BT-Drs. 19/28164, p. 48.
4 Section 19 (2) in conjunction with. Section 3 MLA.
5 Section 3 (3) no. 6 MLA-E.

to a notification duty if shares in an undertaking are to be transferred to it, the assets of which include a domestic property, and the foreign undertaking (indirectly) holds at least 90% of the shares in the other undertaking as a result of the transfer.[6] An exception exists if the foreign undertaking has already submitted the required information to another register of an EU member state, i.e. the beneficial owners of the foreign undertaking are entered in a register corresponding to the German Transparency Register.[7] If the foreign undertaking does not comply with its notification obligations, there is a prohibition on certification.[8]

2. Registered civil law partnerships ("eGbR")

The MoPeG was adopted almost simultaneously with the TraFinG. It comprehensively reforms the law governing civil law partnerships ("GbR"). The law will come into force on January 1, 2024.

One component of the reform is the establishment of a Partnership Register in which civil law partnerships can be entered to give them publicity. It is true that registration in the Partnership Register is to be voluntary and that registration is not a prerequisite for the partnership's legal capacity. However, there is a pre-registration requirement for certain legal transactions.[9] These include, in particular, the acquisition of a right to real property.[10]

With the entry into force of the MoPeG, registered civil law partnerships ("eGbR") will in future be required to provide information on their beneficial owners in the Transparency Register. Section 20 (1) sentence 1 MLA continues to cover all registered partnerships including the eGbR, but not the GbR.

3. Continued application of the area exception *(Bereichsausnahme)* for listed companies?

According to the previous legal situation, in order to fulfil their Transparency Register obligations, listed companies could refer to the transparency requirements under securities trading law (e.g. Sections 33 et seq. of the Securities Trading Act - "WpHG"), or transparency requirements corresponding to EU law with regard to voting rights, or equivalent international standards; a separate notification to the Transparency Register was not required.[11] The Federal Government initially wanted to abolish this exception. It justified this by stating that the current shareholdings could only be traced with unjustifiably high effort by the inspectors, in particular obligated parties, on the basis of securities notifications, especially if (domestic) companies were listed on a foreign stock exchange. In contrast, the listed companies could make a notification to the Transparency Register themselves with much less effort.[12]

However, the Finance Committee of the Bundestag intervened at the last minute and prevented the deletion of the so-called area exception *(Bereichsausnahme)* in Section 3 (2)

6 Section 20 (1) sentence 2 MLA-E.
7 Section 20 (1) sentence 3 MLA.
8 Section 10 (9) sentence 4 MLA; BT Drs. 19/28164, p. 49.
9 BT Drs. 19/27635, p. 2 f.
10 Section 47 (2) GBO-E; BT Drs. 19/27635, p. 206 f.
11 Cf. Section 3 (2) MLA; section 20 (2) sentence 2 MLA old version.
12 BT-Drs. 19/28164, p. 49 f.

sentence 1 MLA, which is included, somewhat contrary to the system, in the definition of beneficial ownership. For the justification, reference is made to the parallelism with Art. 3 (6) lit. a Directive (EC) 2005/60. According to the Finance Committee of the Bundestag, the definition of beneficial ownership should only be reviewed again depending on the further development of EU law.[13] Unfortunately, the notification fiction of Section 20 (2) sentence 2 MLA (old version) was nevertheless deleted.[14]

It is questionable whether the legislator intended to completely exempt listed companies from the Transparency Register obligations of Sections 18 et seq. MLA. The wording of the law and the system allow for interpretations in both directions. However, the legislative process shows that the previous practice is to be maintained and that listed companies do not have to make an additional notification to the Transparency Register because of the already existing[15] transparency requirements under EU law.[16] A clarification in the application recommendations of the supervisory authorities or the FAQ of the Federal Office of Administration (see also section VI. below) would be helpful for practice in this respect.

II. Why double register management and publicity?

The Transparency Register was set up to transpose the Fourth Money Laundering Directive[17] into national law. Germany initially chose a path that saved undertakings a great deal of bureaucracy. The notification obligation was always deemed to have been fulfilled and no separate entry in the Transparency Register was required (notification fiction), if (i) the required information on the beneficial owner was already available in another publicly accessible register, such as the Commercial Register, or (ii) there was already sufficient transparency vis-à-vis the public through the relevant notification obligations under capital market law.[18]

With the Fifth Money Laundering Directive[19], the various transparency registers of the member states were to be interconnected via the central European platform – actually already by March 10, 2021. In Germany, the need for action arose insofar as the Transparency Register often does not contain any information at all due to the notification fiction (so-called negative information). This meant that there was no data basis for linking the information. In these cases, the beneficial owner of an undertaking could only be determined through an overall view of the entries in a number of different registers.

For this reason, the Transparency Register will now be upgraded from a so-called "catch-all register" to a "full register". The notification fiction is dropped. A modernization of the other registers with the aim of achieving interoperability between, for example, the Commercial Register and the Transparency Register was rejected because of the allegedly excessive administrative burden.[20] In future, undertakings will therefore have to ensure

13 BT-Drs. 19/30443, p. 73.
14 BT-Drs. 19/28164, p. 49 f.
15 Cf. Directive (EC) 2004/109 of 15 December 2004.
16 In this respect, also the statement of the German banking industry on the draft bill of the TraFinG of 18 January 2021, p. 5 ff., https://die-dk.de/media/files/210118_DK_Stellungnahme_zu_TraFinG_Gw.pdf (accessed July 20, 2021).
17 Directive (EU) 2015/849 of 20 May 2015.
18 Section 20 (2) in the version prior to the TraFinG.
19 Directive (EU) 2018/843 of May 30, 2018.
20 BT-Drs. 19/28164, p. 3 f.

themselves that they make the necessary entries in the Transparency Register - in parallel with the usual entries in the Commercial Register, the Partnership Register or the Register of Cooperatives - and keep these entries up to date.

Whereas previously the obligated parties were at a disadvantage because the information required to fulfill their due diligence obligations was often not available in the Transparency Register, the burden of providing information is now shifted to the undertakings required to register. At the same time, the legislator clarified that, when identifying beneficial owners, obligated parties must collect the identifying characteristics from their contractual partner or from a person acting on behalf of the contractual partner; collecting the information via the Transparency Register is not sufficient.[21]

Only registered associations received a last minute concession in the legislative process: The office keeping the register[22] will make an entry in the Transparency Register for them on the basis of the data entered in the Register of Associations. The data taken over in this way will be deemed to be the association's information, unless the association has provided different information.[23]

The legislator estimates that around 2.3 million legal entities will have to make a notification to the Transparency Register.[24] The abolition of the notification fiction and the extensions to the Transparency Register mean that in many cases there will be a need for action for the first time and for continuous checks. In addition, strict synchronization of the register entries must be ensured in order to avoid inconsistency reports and fines. Unlike, for example, an incorrect entry in the Commercial Register, which has a publicity effect in favor of third parties,[25] missing, incorrect, incomplete or untimely entries in the Transparency Register may be punished as administrative offenses.[26]

III. Transitional arrangements for existing undertakings and immediate action required for undertakings established on or after August 1, 2021

The TraFinG will come into force on August 1, 2021. For undertakings that were able to invoke a notification fiction under the legal situation applicable until July 31, 2021, the TraFinG provides for relatively generous transitional arrangements - depending on the legal form. This applies both to the transparency obligations (collection, notification, documentation) and to the imposition of fines:

Conversely, it follows that undertakings established on or after August 1, 2021 must comply directly with their transparency obligations.

21 Section 11 (5) MLA-E.
22 The register-keeping body of the Transparency Register is Bundesanzeiger Verlag GmbH, cf. Section 1 Transparency Register Award Ordinance of June 27, 2017.
23 BT-Drs. 19/30443, p. 24 f.; Section 20a MLA-E.
24 BT-Drs. 19/28164, p. 33. However, listed companies will be included here, see above under point I.3.
25 Section 15 Commercial Code ("HGB").
26 Section 56 (1) nos. 55-66 MLA.

Legal form	Transition period for transparency obligations	Suspension of the prosecution of administrative offenses
Public limited company Societas Europaea Partnership limited by shares	March 31, 2022	March 31, 2023
GmbH (European) Cooperative Partnership	June 30, 2022	June 30, 2023
All other cases	December 31, 2022	December 31, 2023

If obligated parties discover discrepancies within the scope of their due diligence obligations, they must report these promptly to the register-keeping body. In the case of discrepancies relating to undertakings that were previously able to invoke a notification fiction, the reporting obligation - across the board for all legal forms - will not apply until April 1, 2023. This is intended to avoid "unnecessary compliance expense".[27] It should be noted, however, that this transitional regulation also does not apply to newly established undertakings.

IV. Inspection

The Transparency Register can be inspected by certain authorities, obligated parties under the Money Laundering Act as well as all members of the public. The TraFinG now clarifies – for data protection reasons – that inspections by authorities may only be carried out for the fulfillment of statutory duties and that inspections by obligated persons may be carried out exclusively for the fulfillment of due diligence obligations.[28] In other respects, it remains the case that the possibility of inspection can be restricted at the request of a beneficial owner. For this purpose, the person concerned must show an interest worthy of protection within the meaning of Section 23 (2) sentence 2 MLA. He or she may also request information on which members of the public have inspected the documents.[29]

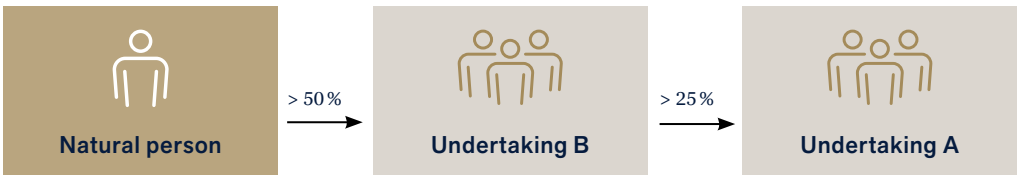
V. Fining regulations

The TraFinG does not substantially change the provisions on fines. As before, violations of transparency obligations can be punished with a fine of up to EUR 150,000 if committed intentionally, and otherwise with a fine of up to EUR 100,000. In the case of serious, repeated or systematic violations, fines of up to EUR 1 million or up to twice the economic benefit derived from the violation are also possible. If such violations are committed by certain obligated parties (e.g. credit institutions, insurance companies), they may be subject to fines of up to EUR 5 million or up to 10% of the total turnover.

27 BT-Drs. 19/28164, p. 58.
28 Section 23 (6) MLA-E.
29 Section 23 (6) MLA = Section 23 (8) MLA-E.

VI. The FAQ of the Federal Office of Administration ("Bundesverwaltungsamt")

The Federal Office of Administration regularly publishes guidance on the Transparency Register.[30] Even though they are not legally binding, practice is almost always guided by them. Most recently, they caused some confusion with regard to indirect shareholdings. In the meantime, however, it should be clear (again) that an indirect beneficial owner generally[31] only exercises control within the meaning of Section 3 (2) sentence 2 MLA if he holds more than 50% in the intermediate company (B) and the latter holds more than 25% in the company (A). The TraFinG does not provide for any changes in this regard.



VII. Summary

Observing transparency obligations has always been part of corporate compliance. With the TraFinG coming into force, their importance is growing suddenly: From August 1, 2021, many legal entities will have to make a notification for the first time. In groups with a large number of undertakings, this will entail a high administrative burden. For obligated parties under the Money Laundering Act, on the other hand, the change in the law may make it easier for them to fulfill their due diligence obligations.

In parallel, Germany also transposed the Sixth Money Laundering Directive[32] in March 2021. It does not provide for any changes with respect to the Transparency Register, but concerns the criminal offense of money laundering. Without being obliged to do so by European law,[33] the legislator has significantly extended the scope of the money laundering offense. According to the new section 261 of the Criminal Code ("StGB"), it is no longer merely a selective catalogue of predicate offences that can be the starting point for a money laundering offence, but any unlawful act (so-called "all crimes" approach). For obligated parties under Section 2 of the MLA, the tightening of the criminal offense also increases the scope of the reporting obligations under Section 43 of the MLA, although the legislator considers the actual compliance costs to be low.[34]

30 https://www.bva.bund.de/SharedDocs/Downloads/DE/Aufgaben/ZMV/Transparenzregister/Transparenzregister_FAQ.html (accessed July 20, 2021).
31 In individual cases, however, veto or objection rights can lead to a dominant influence, cf. BVA, Questions and Answers on the Money Laundering Act (MLA), as of February 9, 2021, p. 13 et seq.
32 Directive (EU) 2018/1673 of 23 October 2018.
33 The Directive contained only minimum requirements, cf. Art. 1 para.1 Directive (EU) 2018/1673.
34 BT-Drs. 19/24180, p. 25 f.

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