

## BANK AND CAPITAL MARKETS LAW

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Germany

## The central register of beneficial owners (transparency register) under the Fourth Money-Laundering Directive

### The Problem

*creation of central registers*

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 ("Fourth Money-Laundering Directive" or simply the "Directive") revised and extended the results which must be achieved by national laws to prevent money laundering and terrorism financing. One of these measures is the creation of central registers (also known as "transparency registers") in each Member State which provide information on the beneficial ownership of legal entities.

The Fourth Money-Laundering Directive was due for implementation into national law in the Member States by 26 June 2017. Although this deadline is now over a year old, some Member States have still not fully implemented the new provisions of the Directive.

### Introduction of central registers of beneficial owners (transparency registers)

*information is stored in a central register located outside the company*

The objective of the Fourth Money-Laundering Directive is the protection of the financial system by preventing, detecting and investigating money laundering and terrorist financing. The Directive recitals state that the need for accurate and up-to-date information on the beneficial owner of legal entities is a key factor in tracing criminals who might otherwise hide their identity behind a corporate structure. With a view to enhancing transparency in order to combat the misuse of legal entities, Member States are therefore required to ensure that beneficial ownership information is stored in a central register located outside the company.

*"beneficial owners" = natural person*

Under the Directive, the "beneficial owners" of companies who must be identified and information about whom must be held in the central register are all natural persons who ultimately own or control a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or through control via other means; a shareholding or ownership interest of more than 25% is deemed to be an (irrefutable) indication of beneficial ownership.

*hold adequate, accurate and current information*

Article 30 of the Directive requires Member States to ensure that corporate and other legal entities obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held. This information must also be held in a central register in each Member State. The Directive does not tell the Member States what precise information must be held. However, the Directive provisions on the scope of access rights are such that this information must include at least the name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held.

*information on beneficial ownership is accessible*

Article 30(5) of the Directive requires that the information on beneficial ownership is accessible

- (a) to competent authorities and FIUs (Financial Investigation Units), without any restriction;
- (b) to persons who are obliged to identify their clients in order to meet their due diligence duties under money laundering law; and
- (c) to any person or organisation that can demonstrate a legitimate interest; according to the recitals this includes "a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud".

*In certain cases Member States may exceptionally restrict access*

Member States are empowered to charge a fee for access to an online register. In certain cases Member States may exceptionally restrict access for obliged entities or other private persons or organisations if access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or if the beneficial owner is a minor or otherwise incapable. Article 31 of the Directive also requires that trusts obtain and hold information on beneficial ownership in a central register to which, however, only public authorities may have access.

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*opens the door to the  
potential improper  
procurement and misuse of  
the personal data*

*is intended to provide wider  
access to national  
transparency registers*

### Conclusion

The introduction of "transparency registers" is certainly a positive development to the extent that this makes it easier for government agencies, such as tax and law enforcement authorities as well as individuals and companies which are required to comply with the identification obligations, to obtain information. The access which it is envisaged private persons or organisations will have to registers is, however, of some concern as this opens the door to the potential improper procurement and misuse of the personal data of beneficial owners.

The European Parliament and the Council have since adopted Directive (EU) 2018/843 of 30 May 2018 ("Fifth Money-Laundering Directive"), which must be implemented by Member States by 10 January 2020. The Fifth Money-Laundering Directive is intended to provide wider access to national transparency registers, including for all members of the general public. In addition, information about the beneficial owners of trusts and similar legal arrangements will also be made accessible to private persons.

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Austria

## The Austrian Beneficial Owners' Register Act (WiEReG)

The Austrian Beneficial Owners' Register Act (WiEReG) implements key provisions of European Directive 2015/849 (Fourth Money-Laundering Directive) and European Directive 2016/2258 into Austria's national law. This law concerns the binding introduction of a register of beneficial owners and access by tax authorities to the information contained in it.

The register is held by the Ministry of Finance (BMF). The task of establishing and running the register has been given to Statistics Austria (Bundesanstalt Statistik Österreich) and Bundesrechenzentrum GmbH. Searches have been possible since 2 May 2018. Initial filings of information about beneficial owners had to be made by 1 June 2018 at the latest.

Lengthy response times have now accumulated owing to the intensive use made of the WiEReG filing form in recent weeks. For this reason, the initial start of semi-automated compulsory criminal proceedings has been postponed until 16 August 2018.

The following table on the legal position created under the WiEReG provides an overview for all those of our colleagues who are interested in a brief introduction to the complex issues involved. Explanations of the numerous legislative abbreviations can be found in a separate glossary.

<p><i>Purpose and rationale of the register of beneficial owners</i></p> <p><b>Section 7 WiEReG</b></p>	<p>The register authority has set up a register of beneficial owners as a regularly updated chronological data collection with the aim of <b>preventing the use of the financial system for the purposes of money laundering and terrorist financing</b> (section 7(1) WiEReG).</p>
<p><i>Legal bases</i></p>	<p>The <b>Beneficial Owners' Register Act - WiEReG</b> (Article 2) sets up a register of the beneficial owners of companies, other legal entities and trusts (entities). The scope of the Beneficial Owners' Register Act is stipulated in binding form in <b>Articles 30 and 31 of Directive (EU) 2015/849</b>.</p>
<p><i>Facts which must be reported</i></p> <p><b>Section 5 WiEReG</b></p>	<p>a) Direct beneficial owners (section 5 No. 1 WiEReG):</p> <ol style="list-style-type: none"> <li>1. First and last name</li> <li>2. If the person concerned is not a resident in Austria, he or she must also provide the number and type of their official identity papers</li> <li>3. Date and place of birth</li> <li>4. Nationality</li> <li>5. Place of residence</li> </ol> <p>b) Indirect beneficial owners:</p> <ol style="list-style-type: none"> <li>1. The information stipulated in section 5 No. 1 on the indirect beneficial owner</li> <li>2. If the top entity falls within the category of entities in section 1, the register number as well as the shareholdings, voting rights or ownership interest of the beneficial owners in the top entity</li> <li>3. If the top entity is an entity which is equivalent to an entity under section 1 which has its head office in another Member State or a third country, the name and registered office of the entity, its legal form, identifiers which are equivalent to the register number and register as well as the shareholdings, voting rights or ownership interest of the beneficial owners in the top entity.</li> </ol> <p>(Information on indirect beneficial owners does not have to be filed if their beneficial ownership results from a top entity under section 2 Nos. 2 and 3 which is itself entered as an entity in the register.)</p> <p>c) The following information must be provided about the type and scope of beneficial ownership of each beneficial owner:</p> <ol style="list-style-type: none"> <li>1. In the case of section 2 No. 1 a (natural person as shareholder), whether the entity is the property of the beneficial owner (stating the shareholding or ownership interest) or whether the beneficial owner has voting rights (stating the share) or is under the control of the beneficial owner in any other way (stating whether a trust relationship applies and whether the beneficial owner is the trustee or the beneficiary of the trust).</li> </ol>

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	<ol style="list-style-type: none"> <li>2. In the case of section 2 No. 1 b (natural person in senior management), whether the beneficial owner is a member of the entity's senior management.</li> <li>3. In the case of section 2 No. 2 (trust), the specified function of the beneficial owner or whether the beneficial owner exercises any other form of control within the meaning of the cited provision.</li> <li>4. In the case of section 2 No. 3 (foundation), the function of the beneficial owner in private foundations or foundations and funds or whether the beneficial owner exercises any other form of control within the meaning of the cited provision.</li> <li>5. In all other cases in which beneficial ownership is established in some other way.</li> </ol>
<p style="text-align: center;"><i>Exemptions</i></p> <p style="text-align: center;"><b>Section 6 WIEReG</b></p>	<ol style="list-style-type: none"> <li>1. <u>Partnerships and limited partnerships</u> do not have to file information if all the personally liable partners are natural persons. In this case, the personally liable partners who are entered in the company register must be counted by Statistics Austria as beneficial owners. Information on any other natural person who exercises direct or indirect control of the company management must be filed.</li> <li>2. <u>Limited liability companies</u> are not required to file information if all the personally liable partners are natural persons. In this case, shareholders who are entered in the company register and who hold more than 25% of the shares must be counted by Statistics Austria as beneficial owners. If no shareholder holds more than 25% of the shares, the managing directors who are entered in the company register must be counted by Statistics Austria as beneficial owners. Information about any other natural person who exercises direct or indirect control of the company management must be filed.</li> <li>3. <u>Cooperative and economic societies</u> are not required to file information. In this case, the members of the management board who are entered in the company register or, if managing directors are also entered, only the managing directors must be counted by Statistics Austria as beneficial owners. Information must be filed if a member holds more than 25% of the shares or if any other natural person exercises direct or indirect control of the management of the cooperative and economic society.</li> <li>4. <u>Mutual insurance undertakings, small insurance associations and savings banks (Sparkassen)</u> are not required to file information. In this case, the members of the board who are entered in the company register or the supplementary register must be counted by Statistics Austria as beneficial owners. Information about any other natural person who exercises direct or indirect control of the company management of one of the above companies must be filed.</li> <li>5. <u>Clubs and associations</u> are not required to file information. In this case, the representatives of the club or association who are entered in the register of associations must be counted by Statistics Austria as beneficial owners. Information about any other natural person who exercises direct or indirect control of the management of a club or association must be filed</li> </ol>
<p style="text-align: center;"><i>Who must be included in the transparency register?</i></p> <p style="text-align: center;"><b>Section 1 WIEReG</b></p>	<ol style="list-style-type: none"> <li>1. Partnerships</li> <li>2. Limited partnerships</li> <li>3. Stock corporations</li> <li>4. Limited liability companies</li> <li>5. Cooperative and economic societies</li> <li>6. Mutual insurance undertakings</li> <li>7. Small insurance associations</li> <li>8. Savings banks (Sparkassen)</li> <li>9. European Economic Interest Groupings</li> <li>10. European companies (SE)</li> <li>11. European cooperative societies (SCE)</li> <li>12. Private foundations, under section 1 PSG</li> <li>13. Other entities which must be entered in the company register under section 2 No. 13 FBG</li> <li>14. Clubs and associations under section 1 VerG</li> <li>15. Foundations and funds under section 1 BStFG 2015</li> <li>16. Foundations and funds set up under a state law in those cases in which the federal law applies at the state level</li> <li>17. Trusts under section 1(3), if their administration is located in Austria. A trust is deemed to have its administration located in Austria in particular in those cases in which the trustee is resident or has its head office in Austria</li> <li>18. Arrangements similar to trusts; these are other arrangements, provided that their function and structure is comparable to that of a trust and its administration is located in Austria.</li> </ol>

	<p>An arrangement similar to a trust is deemed to have its administration located in Austria, in particular in those cases in which the empowered manager comparable to a trustee is resident or has its head office in Austria.</p>
<p><i>Who holds the register?</i></p> <p><b>Section 8 WiEReG</b></p>	<p>The register is held by the Ministry of Finance (BMF). The Ministry must delegate responsibility for setting up (including the required connections), running and developing the register to</p> <ul style="list-style-type: none"> <li>• Statistics Austria (via the company service portal) and</li> <li>• Bundesrechenzentrum GmbH.</li> </ul>
<p><i>Who has access to the transparency register?</i></p> <p><b>Section 9 WiEReG</b> <b>Section 10 WiEReG</b></p>	<ol style="list-style-type: none"> <li>1. Credit institutions under section 2(1) FM-GwG and insurance undertakings under section 2 No. 2 b FM-GwG</li> <li>2. Credit and financial institutions under section 2 No. 1 and No. 2 FM-GwG which are subject to monitoring by the FMA under section 25(1) FM-GwG provided that these are not included in No. 1</li> <li>3. Financial institutions under section 2 No. 2 FM-GwG which are not subject to monitoring by the FMA under section 25(1) FM-GwG</li> <li>4. Gambling licensees under sections 14 and 21 GSpG</li> <li>5. Licensees for gaming machines and betting operators set up under state laws in accordance with the laws which apply at the state level</li> <li>6. Lawyers</li> <li>7. Notaries</li> <li>8. Auditors under section 1(1) No. 1 WTBG 2017</li> <li>9. Tax consultants under section 1(1) No. 2 WTBG 2017</li> <li>10. Accountants, bookkeepers and payroll accountants under section 1 BiBuG 2014</li> <li>11. Business traders, including auctioneers under section 365m1(2) No. 1 GewO 1994, who accept payments in cash of at least 10,000 euros</li> <li>12. Real estate agents under section 365m1(2) No. 2 GewO 1994</li> <li>13. Business consultants under section 365m1 (2) No. 3 GewO 1994</li> <li>14. Insurance brokers under section 365m1(2) No. 4 WTBG 1994</li> <li>15. Austrian Federal Financial Agency</li> <li>16. Natural persons and organisations who have a legitimate interest in connection with the prevention of money laundering and terrorist financing in relation to the entity.</li> </ol>
<p><i>More information</i></p>	<p>Upon entry into force of the Act on 15 January 2018 information could be filed in the register via the federal company service portal. Initial filings for the register had to be made by 1 June 2018. Access to the register has been possible since 2 May 2018.</p> <p>Around 356,000 companies which are required to file information have been entered in the register; under section 1 WiEReG these are referred to as entities.</p> <p>Lengthy response times have now accumulated owing to the intensive use made of the WiEReG notification form. For this reason, the initial start of semi-automated compulsory criminal proceedings has been postponed until 16 August 2018.</p>

Unless otherwise stated, all sections quoted refer to the Beneficial Owners' Register Act (WiEReg)

### Glossary

BiBuG	Bilanzbuchhaltungsgesetz (Accountancy Act)
BStFG	Bundes-Stiftungs- und Fondsgesetz (Federal Foundations and Funds Act)
FBG	Firmenbuchgesetz (Company Register Act)
FM-GwG	Finanzmarkt-Geldwäschegegesetz (Financial Market Money-Laundering Act)
GewO	Gewerbeordnung (Trade Regulations)
GSpG	Glücksspielgesetz (Gambling Act)
PSG	Privatstiftungsgesetz (Private Foundations Act)
VerG	Vereinsgesetz (Club and Association Act)
WiEReG	Wirtschaftliche Eigentümer Registergesetz (Beneficial Owners' Register Act)
WTBG	Wirtschaftstreuhandberufsgesetz (Business Trustee Professions Act)

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Germany

## “Transparency register” in Germany (sections 18 ff. Money-Laundering Act)

The transparency register in Germany is governed by the Money-Laundering Act (GwG).

Question	Answer
<i>What is the purpose and rationale of the transparency register?</i>	The aim of the transparency register is to identify the “natural” persons who are the beneficial owners of “legal” entities and to prevent legal arrangements being misused for the purpose of laundering money or financing terrorism
<i>Legal base</i>	The legal base is section 4 of the Money Laundering Act “GwG” (sections 18 – 26 GwG) which implements the “Fourth EU Money Laundering Directive (Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing)”.
<i>Information which must be filed</i>	Section 19 GwG requires that the following information about the beneficial owner of a legal entity within the meaning of section 20 I sentence 1 GwG or a legal construction under section 21 GwG is filed, i.e. information about the ultimate owner/beneficiary. <ul style="list-style-type: none"> <li>(1) First and last name of the beneficial owner;</li> <li>(2) Date of birth of the beneficial owner;</li> <li>(3) Residence of the beneficial owner; and</li> <li>(4) Type and scope of the beneficial interest within the meaning of section 19 III GwG <ul style="list-style-type: none"> <li>- Ownership interests, exercise of powers of control (e.g. including shareholders agreements),</li> <li>- Function of a legal representative, managing shareholder or partner of the legal entity</li> <li>- Legal construction within the meaning of section 21 GwG (trust assets, foundation, etc.).</li> </ul> </li> </ul>
<i>Who must be included in the transparency register?</i>	<p>All legal persons governed by private law and registered partnerships are required to obtain the information stipulated in section 19 I GwG from their shareholders and to file this information with the transparency register. This duty to file information is deemed to have been met if the information about the beneficial owners is already in the electronic registers within the meaning of sections 20 II/22 GwG, i.e. in the commercial register, the registry of partnerships, the register of cooperative associations, the register of clubs and associations or the business register (e.g. list of a GmbH's shareholders).</p> <p>This means that information must be filed in particular by all legal persons governed by private law (e.g. stock corporations (AG); limited liability companies (GmbH), registered cooperatives, registered clubs or associations) as well as by partnerships in the form of OHGs, KGs or partnership companies, but not however by civil-law partnerships (GbR), as these entities cannot be registered.</p> <p>Trusts (trust assets and foundations) within the meaning of section 21 GwG which have their head office in Germany (determined by the location of the administration) must also file. The duty to file information must be fulfilled by the persons authorised to represent the company, foundation or trust asset in Germany (e.g. managing director/board/trustee).</p>
<i>Who holds the register?</i>	<p>The transparency register is held by the Federal Gazette publishing house (Bundesanzeiger Verlag, <a href="http://www.transparenzregister.de">www.transparenzregister.de</a>) which, under section 25 I GwG, has been publicly appointed to keep electronic registers under an ordinance issued by the Federal Ministry of Finance.</p> <p>Under section 25 VI GwG, the Federal Gazette publishing house exercises legal and technical supervision on behalf of the Federal Office of Administration (Bundesverwaltungsamt) in its function as a private enterprise charged with the performance of state duties.</p>
<i>Who has access to the transparency register?</i>	Authority to access the register is stipulated in section 23 GwG. Accordingly, access is available in particular to:

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	<ul style="list-style-type: none"><li>- FIU - Financial Intelligence Unit (section 27 ff. GwG)</li><li>- Public authorities within the meaning of section 13 Foreign Trade and Payments Act (Außenwirtschaftsgesetz)</li><li>- Law enforcement authorities</li><li>- Federal Central Tax Office (Bundeszentralamt für Steuern)</li><li>- Local tax authorities</li><li>- The competent authorities for the investigation, prevention and removals of dangers</li><li>- All the supervisory authorities responsible for these authorities</li></ul> <p>Obligated entities also have access provided that they demonstrate that access is required in order to comply with essential due diligence procedures within the meaning of section 10 III GwG; access is also available to anyone else who can demonstrate that they have a legitimate interest. The pursuit of claims in civil proceedings (e.g. enforcement claims against shareholders under section 826 German Civil Code (BGB) or similar) may not be sufficient to constitute a legitimate interest.</p>
<p><i>Further information:</i></p>	<p>The provisions of sections 18 ff. GwG leave a number of legal issues unanswered. The Federal Office of Administration has responded to this situation by publishing a 15-page commentary on how to deal with a number of specific cases; this is available at <a href="http://www.transparenzregister.de">www.transparenzregister.de</a>.</p> <p>The constitutional implications of the transparency register also remain a matter of contention.</p>

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