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New UBO reporting obligations for foreign entities with direct or indirect ownership in German real estate

Even share deals in German inbound structures that date
back a long time can trigger reporting obligations

Executive summary

The new year has started with new reporting obligations for foreign entities that have direct or indirect ownership in German real estate. Already under the old provisions, foreign entities that newly acquired real estate in Germany, whether directly or through the acquisition of shares (so-called "share deals"), were required to report their Ultimate Beneficial Owner ("UBO") to the German UBO register (also known as "Transparenzregister" - "transparency register"), unless certain exceptions apply. This reporting obligation has now been extended to also cover existing German real estate ownership, be it directly or be it through shares in a real estate owning company.

The respective reporting is due by 30 June 2023. Non-compliance with these rules can result in significant penalties that can even reach a six- or even seven-digit Euro amount, combined with a publication of the penalty assessment on the internet ("naming and shaming").

Detailed discussion

Previous law applicable until 27 December 2022

Already since 1 January 2020, foreign entities have basically been obliged to report their UBO(s) to the German transparency register, if they undertook to acquire real estate in Germany. This obligation was then extended effective 1 August 2021 to also cover share deals in accordance with § 1 para. 3 or 3a of the German Real Estate Transfer Tax Act ("Grunderwerbsteuergesetz" - "GrEStG").

UBO definition

An UBO of an entity is basically defined as an individual who

- ▶ directly or indirectly holds more than 25% of entity's shares,
- ▶ directly or indirectly holds more than 25% of the entity's voting rights, or
- ▶ controls the entity in a similar way.

If an individual cannot be identified as the beneficial owner after completing the various review steps, the legal representatives, managing shareholders or partners are deemed to be the UBOs of the entity.

New law since 28 December 2022

Triggering events

The Sanctions Enforcement Act II has now further extended the UBO reporting obligations for foreign entities to also cover existing German real estate investments and existing German real estate structures. In essence, in addition to the acquisition cases, a foreign entity now basically also has to report its UBO(s) to the German transparency register, if

- ▶ it directly owns German real estate since a point in time prior to 1 January 2020,
- ▶ it owns shares within the meaning of § 1 (3) GrEStG in an entity owning German real estate since a point in time prior to 1 August 2021, or
- ▶ it owns an economic interest within the meaning of § 1 (3a) GrEStG in an entity owning German real estate since a point in time prior to 1 August 2021.

Exception from the UBO reporting obligation

Does it really provide relief?

The new UBO reporting obligations do not apply for those foreign entities that have already reported the relevant UBO data to another UBO register in an EU member state. It is questionable, though, if this escape clause really provides relief for entities being resident in the EU. This is because there is no common understanding in the EU member states on how to determine an UBO of an entity, in particular in

cases of indirect ownership of an individual in the respective entity. While for instance Germany requires that an individual can control an interposed entity in order for a more than 25% stake in a target entity being allocated to that individual, other countries e.g. apply a multiplication concept, where the ownership interests are multiplied along the shareholder chain in order to assess, if an individual owns more than 25% (or the respective threshold applicable in that jurisdiction) in a target entity. Furthermore, under the German UBO interpretation, even an individual being a 0% general partner of a limited partnership or an individual who controls the 0% general partner of a limited partnership can be an UBO of the partnership and its subsidiaries. This concept is not necessarily applied in other countries, which can result in different conclusions also in fund structures.

As a consequence, there are cases in practice, where individuals have been reported as UBOs to an UBO register of an EU member state that do not classify as UBOs for German purposes or vice versa.

Indirect ownership in German real estate through shares Far reaching scope?

As mentioned, not only the direct ownership of German real estate through foreign entities is affected by the new rules,





but also the ownership of shares in a (foreign or German) real estate owning company (in the following referred to as “PropCo”). According to the wording of the law, the reporting obligation also applies to foreign entities that have acquired or unified since a point in time prior to 1 August 2021 - directly or indirectly - at least 90% (current threshold of § 1 (3) GrEStG) of the shares in a PropCo. The same is true for an at least 90% economic ownership in a PropCo within the meaning of Sec. 1 (3a) GrEStG since a point in time prior to 1 August 2021.

At first glance, the scope of the new law seems to be very broad. This is because the wording might suggest that every foreign entity that directly or indirectly owns at least 90% in a PropCo is now required to report its UBO(s) to the German transparency register. In a multi-tier structure, this reporting obligation could then even impact multiple entities, even if there is a lower-tier German entity that owns the real estate and has reported its UBO(s) to the German transparency register. Furthermore, even a 94.9% acquisition of shares that did not trigger German Real Estate Transfer Tax (“RETT”) in the past (the former 95% threshold of § 1 (3) and (3a) GrEStG was applicable until 30 June 2021), could now result in an UBO reporting obligation.

It seems questionable, if the German lawmakers actually wanted to have such a far-reaching scope, but rather wanted to have those entities being required for UBO reporting that actually triggered a RETT event. It is to be hoped that this is clarified at least by the competent authorities soon. Until then, it needs to be decided on a case-by-case basis, which entity or entities should make the reporting.

Integration of land register data into the transparency register

Basic land register data on owners, land parcels and land register files will be integrated into the transparency register and assigned to the entities listed therein. That is, in future

the transparency register will not only include an entity’s UBO(s), but also any real estate the entity owns or has owned. The transfer of the data has to be done by the land registry office by 31 July 2023 based on the data as of 30 June 2023. That is, these new rules do not entail a reporting obligation for the respective entities. Members of the public will not have access to this real estate information, but only authorities and obliged entities under local Anti-Money-Laundering law (e.g. banks, lawyers, tax advisory, notaries, etc.). The latter group will then have an obligation to make inconsistency notifications to the transparency register from 1 January 2026, if they identify deviations between the land data in the transparency register and the data they have on file.

Deadline and penalties

For foreign entities with existing German real estate there is not much time left, as the reporting is due by 30 June 2023. Non-compliance with the UBO reporting obligations (be it late reporting, false reporting, none reporting) can result in significant penalties of up to EUR 150,000 in case of a first-time violation and even up to EUR 1 Mio. or up to twice the benefit derived from the violation in case of serious, repeated or systematic violation. Furthermore, as a measure of “naming and shaming”, once a penalty assessment has become legally binding, it will be published on the website of the German Federal Administrative Office (“Bundesverwaltungsamt”), where ca. 1,200 entries already exist (“naming and shaming”).

Recommendations

Foreign entities that have German real estate in their structure should therefore quickly start reviewing, if and to what extent they are subject to the new reporting obligations. In addition to direct ownership in German real estate, all 90% or more shareholdings in PropCos that existed on or after 28 December 2022 should be included in the review, even if they are below 95% and thus did not trigger German RETT under the old rules.

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