

Disclosure of financial statement documents

I. Size categories and disclosure requirements

What financial information is to be disclosed is determined by the size of the organisation subject to the disclosure requirements.

The German Commercial Code (Handelsgesetzbuch, HGB) differentiates between large, mid-sized, small and very small businesses. Arts. 267, 267a HGB¹ state that classification in one of these categories is determined by the value of certain threshold figures on the corresponding cut-off date – namely balance sheet total, total turnover and number of employees; if the specified values are exceeded on the cut-off dates on two successive business years, the business will be classified in the next highest category.

Prior to the introduction of the German Accounting Directive Implementation Act (Bilanzrichtlinie-Umsetzungsgesetz, BilRUG) the threshold figures were:

- Threshold figures - very small to small businesses
 - balance sheet total €350,000
 - total turnover €700,000 and
 - yearly average employee total 10 maximum
- Threshold figures - small to mid-sized businesses
 - balance sheet total €4,840,000.00
 - total turnover €9,680,000.00 and
 - yearly average employee total 50 maximum
- Threshold figures - mid-sized to large businesses
 - balance sheet total €19,250,000.00
 - total turnover €38,500,000.00 and
 - yearly average employee total 250 maximum

Following the introduction of the BilRUG, the new thresholds are:

- Threshold figures - very small to small businesses
 - balance sheet total €350,000
 - total turnover €700,000 and

¹ Unless otherwise specified in the following, the version of the 'HGB' stipulated in the BilRUG applies.

- yearly average employee total 10 maximum
- Threshold figures - small to mid-sized businesses
 - balance sheet total €6,000,000.00
 - total turnover €12,000,000.00 and
 - yearly average employee total 50 maximum
- Threshold figures - mid-sized to large businesses
 - balance sheet total €20,000,000.00
 - total turnover €40,000,000.00 and
 - yearly average employee total 250 maximum

The following rules also apply following introduction of the BilRUG:

- The old threshold figures apply to all business years that commence prior to 1 January 2014.
- In the case of business years that commence on 1 January 2014 (or later) businesses are free to choose which of the threshold figures (old or new) to apply. Businesses that choose to apply the new threshold figures must then also observe the stipulations of Art. 75, section 2 of the Introductory Act to the German Commercial Code (Einführungsgesetz zum Handelsgesetzbuch, EGHGB).
- The new threshold figures apply to all business years that commence on 1 January 2016 (or later).

In addition, there are also several special definitions (e.g. capital market-orientated businesses are always to be classified as large businesses and their disclosure requirements, irrespective of their size and legal form, are identical to those for large companies limited by shares; i.e. 'Kapitalgesellschaften'). Per Arts. 340, 340 section 4 sent. 3 HGB, this also applies to financial services companies assuming that their legal form is that of a company limited by shares. These special disclosure requirements do not apply to financial services companies that are not limited by shares but are subject to the provisions of Art. 264a HGB (e.g. are a GmbH & Co. KG), but they are subject to the general disclosure requirements set out in Arts. 264a and 325 HGB for companies limited by shares.

Art. 267a HGB also specifies that the following businesses are not to be defined as very small companies limited by shares: investment companies, holding companies and companies whose sole purpose is to acquire holdings in other companies or to manage and exploit these holdings.

Large and mid-sized businesses – although Art. 327 HGB allows mid-sized businesses certain exemptions with regard to the disclosure of information – are required to disclose all the documentation specified in Art. 325 HGB.

Normally, these are:

- The annual financial statement, with balance sheet, profit and loss calculation plus annex (following introduction of the BilRUG, the annual financial statement must now be verified and approved)
- The auditor's report
- The status report
- The report of the supervisory board (assuming that the business has a supervisory board)
- The proposal or resolution for the appropriation of results (now a mandatory requirement in the annex per Art. 285 No. 34 HGB following introduction of the BilRUG)
- The declaration of compliance with the Corporate Governance Code per Art. 161 of the German Companies Act (AktG – for inter alia, quoted joint stock companies and limited partnerships)

As in the past, there are exemptions per Art. 326, section 1 HGB for small businesses that only need to disclose balance sheet and annex (without profit and loss calculation).

Businesses that are very small companies limited by shares as defined in Art. 267a HGB may also dispense with the annex assuming that certain information is provided in the balance sheet and can apply per Art. 326 section 2 HGB to meet their disclosure requirements by means of depositing at the Bundesanzeiger.

Starting with business years commencing on 1 January 2016, financial services companies may no longer opt for this form of disclosure, irrespective of their legal form.

Cooperative organisations, on the other hand, and starting with business years commencing on 1 January 2016, may apply to use this simplified form of disclosure.

II. Exemption of subsidiaries

Subsidiaries are exempt from the requirement to disclose their annual financial statement per Art. 264 section 3 HGB and Art. 264b HGB, if all of the following criteria are met.

The Federal Office of Justice can impose fines in cases in which there is failure to disclose an annual financial statement when the exemption criteria do not apply.

Exemption criteria for companies limited by shares (e.g. the legal forms AG, GmbH and KG a.A.)

1. The shareholders have agreed to the exemption per Art. 264 section 3 sent. 1 No. 1 HGB
2. The parent company has assumed liability for the subsidiary per Art. 264 section 3 sent. 1 No. 2 HGB
3. The annual accounts and status report of the concern conform, per Art. 264 section 3 sent. 1 No. 3 HGB, to the valid national and EU regulations
4. Exemption of the subsidiary is specified in the annex to the annual accounts of the concern as per Art. 264 section 3 sent. 1 No. 4 HGB
5. Art. 264 section 3 sent. 1 No. 5 HGB stipulates that the following documentation is to be disclosed:
 - The exemption resolution of the shareholders (per Art. 264 section 3, sent. 1 No. 1 HGB).
The business year in question must be specified in the resolution and notification or it must be at least apparent to which business year the resolution applies. It is not sufficient to include a reference to the inclusion of the subsidiary in the annual accounts of the parent company from a particular date.

The notification must make clear reference to the requirements for disclosure. A resolution that exempts the annual financial statement from auditing is also not sufficient.

The resolution may not be approved prior to the commencement of the business year in question ('anticipatory resolution'). It may apply only to the business year in question, i.e. to that business year for which the annual financial statement has not yet been prepared (previous year) or for which the annual financial statement will next be prepared (current year).

The approved exemption resolution itself must be disclosed. The disclosure need not reproduce the wording of the resolution but it must be at least apparent that the shareholders have approved the resolution while the business year in question for which they have approved the exemption per Art. 264 section 3 must be identified. It is not sufficient to simply state that an approved exemption resolution has been submitted for entry in the German register of companies.

- Assumption of liability per Art. 264 section 3 sent. No. 2 HGB.

The parent company is not required to assume direct liability at the highest level. It is sufficient when the primary parent company preparing the accounts has assumed indirect liability for the subsidiary through a continuous series of liability agreements with the concern businesses. This liability must be legally binding until at the least the legal deadline for disclosure.

- The corresponding annual accounts and status report of the concern and the auditor's report.

Please note:

The documentation required, per Art. 263 section 3 sent. 2 and 3 HGB, may also be disclosed by the exempting parent company assuming that this information is published in the Bundesanzeiger in such a way that it can be directly associated with the subsidiary.

To ensure this is the case, when annual accounts for a concern are submitted by a parent company, the parent company will be asked which subsidiaries are to be exempted in connection with these accounts.

Exemption requirements for business partnerships ('Personenhandelsgesellschaften') as defined in Art. 264a HGB (e.g. legal forms GmbH & Co. OHG, GmbH & Co. KG)

1. The subsidiary must be included, per Art. 264b No. 1 HGB, in the annual accounts and status report of the concern issued by the personally liable partner or the parent company as defined in Art. 264b No. 1b HGB.
2. The annual accounts and status report of the concern must conform to the stipulations of Art. 264 section 3 No. 3 HGB.
3. Exemption of the subsidiary must be specified per Art. 264b No. 3 HGB in the annex to the annual accounts.
4. The following documentation is to be disclosed per Art. 264b No. 4 HGB in view of the general disclosure requirements of Art. 325 sections 1-1b HGB for the subsidiary:
 - Annual accounts of the concern
 - Status report of the concern
 - Auditor's report

In the case of these subsidiaries and per Art. 264b No. 4 half sent. 2 HGB in association with Art. 264 section 3 sent. 2 and 3 HGB, the disclosure may also be undertaken by the parent company assuming the documentation is published in the Bundesanzeiger and can appropriately be associated with the subsidiary.

Again, when annual accounts for a concern are submitted by a parent company, the parent company will be asked which subsidiaries are to be exempted in connection with the accounts as specified above for companies limited by shares.

III. Disclosure requirements for branch establishments of companies limited by shares that are based outside Germany

German branch establishments of companies limited by shares registered in other EEC member states or contracting member states of the EEC treaty must, per Art. 325a HGB, also disclose in Germany the financial accounting documentation of their head office that has been prepared, audited and disclosed in accordance with the laws of the country in which the head office is based.

This means that the corresponding documentation, as a rule in German, must be submitted for publication in the Bundesanzeiger through www.publikations-plattform.de. If German is not the official language of the country in which the main office is registered, the documentation may also be submitted in English or in an attested suitable translation. In the latter case, only the text of the attestation must be translated into German. This translation must itself be attested. (cf. Art. 325a section 1 sent. 3 HGB).

There are special rules that apply in general to branch establishments of credit institutes and insurance organisations.