

CLIENT ALERT

JULY 14, 2021

Disclosure of Beneficial Ownership in 2021 – General EU Perspective – Alert 2 of the Series

As evidenced in our previous Client Alert of this series,¹ the beneficial ownership topic has gained further significant momentum in the last months and culminated with the G7 countries commitment to establish and strengthen beneficial ownership registers and their call for a global implementation of the Financial Action Task Force (FATF) standards.

This alert is the second of a series prepared by Curtis Mallet-Prevost Colt Mosle LLP (Curtis) discussing the FATF standards, the US, the EU, UK and Switzerland recent legislation on beneficial ownership, as well as the actions that affected entities should take to comply with the new requirements.

In the next alert – *“Implementation of the EU Beneficial Ownership Regulation”* – we will focus on how Member States implemented EU Beneficial Ownership discipline, evidencing the difference among jurisdictions and the impact on affected entities.

Directive (EU) 2015/849 and Beneficial Ownership’s Disclosure - The EU Discipline

The European Union through its Fourth and Fifth Anti-Money Laundering Directives², respectively effective as of June 26, 2015 and as of July 9, 2018,

¹ For more information on the first Client Alert please visit <https://www.curtis.com/our-firm/news/international-insight-disclosure-of-beneficial-ownership-in-2021-international-and-us-perspectives-alert-1-of-the-series>.

² See Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849>; and Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843>. Please note that in the European Union, the first AML directive was adopted in 1990 in order to prevent the misuse of the financial system to conduct money laundering. It firstly implied obligations for entities to apply customer due diligence requirements when entering into a business relationship. For the purpose of the

introduced and regulated the legal framework for the Beneficial Ownership National Register (National Register) for corporate entities, trusts, and other legal arrangements.

In March 2021, the EU - completing the Beneficial Ownership legal framework - issued Regulation 2021/369 which established the technical specification necessary to implement the Beneficial Ownership Registers Interconnection System (BORIS)³, representing the last mile necessary for “*the interconnection [...] of the central registers of Member States that contain information on beneficial ownership and coordination of national systems that have different technical characteristics*”⁴.

Who qualifies as beneficial owner under EU Regulation?

Rooted on a risk-based approach, the Fourth Anti-Money Laundering Directive (4AMLD) provides for two definitions of “*beneficial owner*”: one applicable to corporate entities and another one to trusts.

In case of corporate entities, beneficial owner is defined as the natural person who:

- (a) ultimately owns or controls more than 25% of a company’s shares or voting rights (directly or indirectly)⁵;
- (b) exercises control over the management of the company via any means⁶; or
- (c) in case both (a) and (b) fails to identify the beneficial owner, any person retaining a senior management position⁷.

present Client Alert, only the 4AMLD and the 5AMLD have been examined, as the beneficial ownership framework was introduced by the 4AMLD, amending, replacing and supplementing previous Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 (3AMLD), available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%2005%2F60%2FEC>. Furthermore, please consider that the 5AMLD has been followed by Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (6AMLD), effective as of December 3rd, 2020, to be implemented by July 3rd, 2021, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R1673>.

³ See Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in Directive (EU) 2015/849 of the European Parliament and of the Council, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R0369>.

⁴ See recital no. 37 of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018.

⁵ For the definition See Art. 3, n. 6 (a) (i) 4AMLD.

⁶ See Art. 3, n. 6 (a) (i) 4AMLD.

⁷ See Art. 3, n. 6 (a) (ii) 4AMLD.

In case of trusts, beneficial owner is defined as:

- (a) the settlor;
- (b) the trustee;
- (c) the protector;
- (d) the beneficiaries or class of beneficiaries, and
- (e) any other natural person exercising effective control over the trust⁸.

Beneficial Ownership information collection and access

Corporate and other legal entities incorporated within a Member State are required to:

- i. obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held;
- ii. provide, in addition to information about their legal owner, beneficial ownership information to obliged entities defined in Article 2 of 4AMLD⁹ (Obliged Entities) when the Obliged Entities are taking Customer Due Diligence (CDD) measures and
- iii. grant timely access to beneficial ownership information to competent authorities and Financial Intelligence Units (FIUs).

National Register and access

Beneficial ownership information shall be held in a central register in each Member State¹⁰ (National Register). Member States shall notify to the Commission the characteristics of the National Register and the procedures governing them.

Beneficial ownership information contained in the National Register shall be accessible in all cases to:

- (a) competent authorities and FIUs, without any restriction;

⁸ See Art. 3, n. 6 (b) 4AMLD.

⁹ See Article 2, (1), 4AMLD definition includes credit institutions, financial institutions, certain professionals (such as auditors, external accountants, tax advisors and in certain circumstances notaries and other independent legal professionals) trust or company service providers, estate agents and providers of gambling services.

¹⁰ For example a commercial register, companies register as referred to in Article 3 of Directive 2009/101/EC of the European Parliament and of the Council.

- (b) Obligated Entities, within the framework of customer due diligence;
- (c) any person or organization that can demonstrate a legitimate interest, but some restrictions may apply¹¹.

Access to beneficial ownership information shall be in accordance with data protection rules and may be subject to online registration and to the payment of a fee.

Member States may provide for exemptions to access as indicated in point (b) (Obligated Entities) and point (c) (and any person or entity that can demonstrate a legitimate interest), to all or part of beneficial ownership information on a case-by-case assessment in exceptional circumstances, where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable. However, exemptions granted are not applicable to credit and financial institutions and to certain specific Obligated Entities.¹²

In any case, the National Register shall ensure timely and unrestricted access by competent authorities and FIUs, without alerting the concerned entity. It shall also allow timely access by Obligated Entities when taking customer due diligence measures.

Member States shall ensure that competent authorities and FIUs are able to provide beneficial ownership information held by corporate entities as well as those registered in the National Register to the authorities and to the FIUs of other Member States in a timely manner.

Finally, the 4AMLD provides that the National Register of each Member State shall be interconnected¹³ through the European central platform Beneficial Ownership Registers Interconnection System.

A similar discipline is envisaged for trusts by Article 31 4AMLD.

Sanctions

¹¹ In the last case limitations may apply, but to the persons or organizations referred to in point (c) shall access 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.

¹² For example, obliged entities referred to Article 2(1), point (3)(b) of Directive (EU) 2015/849 that are public officials.

¹³ See Art. 30 n. 10 and Art. 31 n. 9, 4AMLD.

The 4AMLD provides that national laws shall contemplate administrative sanctions for breaches of beneficial ownership rules which shall be “*effective, dissuasive and proportionate*,” leaving Member States to define the administrative sanctions level.

Each Member State is also free to impose criminal penalties.¹⁴

Additionally, certain jurisdictions provide for specific corporate law remedies to sanction the shareholder’s refusal to provide beneficial ownership information, such as limitations on the shareholder’s voting rights and the possibility of challenging resolutions passed with his/her casting vote.¹⁵

Impact on Companies

The establishment of National Register is a welcomed measure but it has also raised various concerns such as the reporting costs for corporate entities, the absence of the indication of a precise degree of investigation to be adopted in order to correctly comply with the beneficial ownership requirements and finally the interference with the individual rights to privacy.¹⁶

Regarding privacy protection issues, some Member States are facing difficulties in the implementation of the EU rules, as there are regulatory *vacuums* concerning the potential conflicts between the right to access beneficial ownership information and the individual’s right to privacy. In particular, the EU regulation seems to leave untinged the absence of a supervisory authority and the absence of a procedure concerning access to the National Register, leaving unguided many issues, such as the scrutiny on the legitimacy of the requests, the accuracy of the data included in the National Registers and the interpretation of the “*legitimate interests*” requirement.

The next alerts will focus on these and other aspects regarding the implementation of the new beneficial ownership regulations in specific EU jurisdictions, as well as the UK and Switzerland.

¹⁴ See Art. 58 4AMLD.

¹⁵ See for example, Italian Legislative Decree no. 231/2007, *Attuazione della direttiva 2005/60/CE concernente la prevenzione dell’utilizzo del sistema finanziario a scopo di riciclaggio dei proventi di attività criminose e di finanziamento del terrorismo nonché della direttiva 2006/70/CE che ne reca le misure di esecuzione*, Article 22, n. 3.

¹⁶ Please note that, as of May 19, 2021, the European Data Protection Board has presented its recommendation on the data protection implications of Anti-Money Laundering Legislation.

About Curtis

Curtis, Mallet-Prevost, Colt & Mosle LLP is a leading international law firm. Headquartered in New York, Curtis has 18 offices in the United States, Latin America, Europe, the Middle East and Asia. Curtis represents a wide range of clients, including multinational corporations and financial institutions, governments and state-owned companies, money managers, sovereign wealth funds, family-owned businesses, individuals and entrepreneurs.

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