

CLIENT ALERT

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Disclosure of Beneficial Ownership in 2021 – Luxembourg Perspectives – Alert 5 of the Series

Transposal of EU Beneficial Ownership Regulation into Luxembourg law

By Law of January 13, 2019¹ (RBE Law), Luxembourg implemented the transparency requirements provided in the Directives (EU) 2015/849 and 2018/843, establishing the “*Registre des Bénéficiaires Effectifs*”, whose purpose is to collect and make available to the public information on Beneficial Owners of Luxembourg entities.

The Luxembourg Beneficial Ownership regulatory framework has been completed first with the issuance on February 15, 2019 of the Grand-Ducal Regulation² setting the rules for the registration with the Beneficial Owners Register and for the general access to the Beneficial Owners Register information, and then with the issuance on February 25, 2019, by the Luxembourg Business Register of Circular no. 19/02,³ clarifying certain aspects relating to the scope of the Beneficial Owners’ Register and the filings to be made thereto.

¹ See the “*Loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs et portant la transposition des dispositions de l’article 30 de la directive (UE) 2015/849 du Parlement européen et du Conseil du 20 mai 2015 relative à la prévention de l’utilisation du système financier aux fins du blanchiment de capitaux ou du financement du terrorisme, modifiant le règlement (UE) n. 648/2012 du Parlement européen et du Conseil et abrogeant la directive 2005/60/CE du Parlement européen et du Conseil et la directive 2006/70/CE de la Commission; la modification de la loi modifiée du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises*” available at <https://legilux.public.lu/eli/etat/leg/loi/2019/01/13/a15/jo>.

² See “*Règlement grand-ducal du 15 février 2019 relatif aux modalités d’inscription, de paiement des frais administratifs ainsi qu’à l’accès aux informations inscrites au Registre des bénéficiaires effectifs*”, available at <https://legilux.public.lu/eli/etat/leg/>.

³ See Circular LBR no. 19/02, issued by the Luxembourg Business Register.

What entities are subject to Beneficial Ownership disclosure under Luxembourg law

RBE Law applies to all entities required to be registered with the Company Register, including private companies, investment funds, pensions and savings entities, as well as Luxembourg branches of foreign entities.⁴ However, companies whose securities are listed on an EU regulated market⁵ are required to register only the name of the regulated market where their securities are listed.

RBE Law requires that the above entities shall obtain and file within the Beneficial Owner Register adequate, up-to-date and accurate information regarding their Beneficial Owner/s. The collected information, together with the registration requests and the supporting documents⁶ (as specified by the Grand-Ducal Regulation⁷), shall be kept in the Register of Beneficial Owner until the fifth anniversary following the entity's deregistration from the Company Register.⁸

⁴ See Article 1 of the amended Law of 19 December 2002 on the register of commerce and companies and the accounting and the annual accounts of companies.

⁵ See RBE Law, Article 3 (2). Please note that the exemption applies also in case of listing in non-EU regulated markets imposing obligations recognized as equivalent by the European Commission within the meaning of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information on issuers whose securities are admitted to trading on a regulated market.

⁶ The Grand-Ducal Regulation, Article 5 defines the supporting documents as those “*The supporting documents include: (1) for natural persons not entered in the trade and company register, official documents allowing the identity of the beneficial owners to be established, accompanied by a translation into French, German or Luxembourgish if the official documents are not written in characters Latin; (2) if any demand limiting of access to information as referred to in Article 15, paragraph 1 st , of the aforementioned Act of 13 January 2019 ; and (3) where applicable, a document certifying that the entity is a company whose securities are admitted to trading on a regulated market in the Grand Duchy of Luxembourg or in another State party to the Agreement on the European Economic Area or in another third country imposing obligations recognized as equivalent by the European Commission within the meaning of Directive 2004/109 / EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency obligations concerning information on issuers of which the transferable securities are admitted to trading on a regulated market and amending Directive 2001/34 / EC.*”

⁷ See the “*Règlement grand-ducal du 15 février 2019 relatif aux modalités d’inscription, de paiement des frais administratifs ainsi qu’à l’accès aux informations inscrites au Registre des bénéficiaires effectifs.*”

⁸ See RBE Law, Article 10.

Entities are responsible for the compliance with the submission requirements,⁹ while Beneficial Owner/s are required to provide all necessary information in order to enable the entity to comply with the transparency requirements provided by RBE Law.¹⁰

Who qualifies as Beneficial Owner under Luxembourg law

RBE Law does not contain a definition of Beneficial Owner and it simply refers to the Beneficial Owner definition provided for by Luxembourg Law of November 12, 2004 (AML Law).¹¹ According to AML Law provisions, are considered Beneficial Owner/s (i) any natural person(s) who ultimately owns or controls an entity or (ii) any natural person(s) on whose behalf a transaction or an activity is being conducted.¹²

In particular, according to AML Law,¹³ Beneficial Owner is considered any natural person who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of shares, voting rights or ownership interest in that entity, including through bearer shareholdings, or through control via any other means.

AML Law further specifies the following criteria to be used for the identification of control through direct and indirect ownership:

- in case of direct ownership, Beneficial Ownership is presumed when a shareholding of 25% plus one share or an ownership interest of more than 25% in an entity is held by a natural person;
- in case of indirect ownership, Beneficial Ownership is presumed when a shareholding of 25% plus one share or an ownership interest of more than 25% in an entity is held (i) by a corporate entity, which is under

⁹ See RBE Law, Article 4 (1).

¹⁰ See RBE Law, Article 17 (1).

¹¹ See the “*Loi du 12 novembre 2004 relative à la lutte contre le blanchiment et contre le financement du terrorisme portant transposition de la directive 2001/97/CE du Parlement européen et du Conseil du 4 décembre 2001 modifiant la directive 91/308/CEE du Conseil relative à la prévention de l’utilisation du système financier aux fins du blanchiment de capitaux*”.

¹² Please note that for the purpose of this Client Alert, entities include trusts and other legal arrangements, which are subject to the same Beneficial Owner’s disclosure obligations as provided for companies.

¹³ See AML Law, Article 1, Paragraph 7(a)(i).

the control of a natural person(s), or (ii) by multiple corporate entities, which are under the control of the same natural person(s).

In the event no natural person can be identified according to the above criteria, or in case doubts remain, AML Law provides that the Beneficial Owner shall be identified as any natural person who holds the position of senior managing official in the entity.¹⁴

Beneficial Ownership information – collection and access

According to RBE Law, Beneficial Owners are required to provide their personal information to the entity in order for the latter to comply with the filing requirements with the Register of Beneficial Owner. In particular, each entity shall obtain and maintain adequate, accurate and up-to-date information regarding¹⁵:

- first and last name;
- nationality and country of residence;
- date and place of birth;
- private or professional address;
- national or foreign identification number; and
- nature and scope of Beneficial Ownership held.

This information, together with supporting documents proving the identity of the Beneficial Owners, shall be filed electronically¹⁶ through the Luxembourg Business Register portal within one month starting from the moment when the entity became aware or should have become aware of the event that makes the registration necessary.

The Beneficial Owners' Register is managed by a special department under the authority of the Minister of Justice, the "*Administrator*", acting as a data processor within the meaning of the EU Regulation 2016/679.¹⁷ The

¹⁴ See AML Law, Article 1, Paragraph 7(a)(ii).

¹⁵ See RBE Law, Article 3 (1).

¹⁶ See RBE Law, Article 4 (1).

¹⁷ See RBE Law, Article 5.

Administrator is responsible for the registering, safeguarding, managing and providing information in accordance with the provisions of law.

Full access to the Beneficial Owner's information contained in the Register of Beneficial Owners is granted to National Authorities only, as defined by Article 1 (5) of RBE Law.¹⁸ At the same time, the general public has access to all the Beneficial Owner information other than the information on the private/professional address and the national/foreign identification numbers.¹⁹ Consultation is carried out electronically according to the procedures set out by Grand-Ducal Regulation and such procedure must be arranged so that access is secured by strong authentication systems, that information relating to the person having carried out the consultation, the information consulted, the date and time during which the consultation was carried out, as well as the precise reason for the consultation, can be traced back at any time. Log data must be kept for a period of five years from their recording, after which they are deleted.²⁰

RBE Law provides that entities as well as Beneficial Owners may request in exceptional circumstances the Luxembourg Business Register to limit the access to the Beneficial Ownership information available in the Beneficial Owners Register. According to RBE Law are considered “*exceptional circumstances*” cases where access to the information could lead to a disproportional risk of fraud, kidnapping, blackmail, extortion, harassment or intimidation towards the Beneficial Owner or cases where the Beneficial Owner is a minor or is otherwise incapacitated.²¹

Luxembourg Business Register may grant a limitation of access only for a limited time – equal to the duration of the circumstances which justify any such restriction – and for a maximum period of three years,²² renewable upon

¹⁸ National Authorities are defined by RBE Law, Article 1 (5) to include, among others, the State Prosecutor General, State Prosecutors and members of their prosecution services; investigating judges; the financial intelligence unit; the judicial police officers; the Financial Sector Supervisory Commission; the Insurance Commission; the Administration of registration, domains and VAT; the Customs and Excise Administration; the State Intelligence Service; the Administration of Direct and the Ministry of Foreign and European Affairs within the framework of its specific powers in the fight against money laundering and the financing of terrorism.

¹⁹ See RBE Law, Article 12.

²⁰ See RBE Law, Article 13.

²¹ See RBE Law, Article 15 (1).

²² See RBE Law, Article 15 (3).

a new motivated request. The granting of the limitation of access shall be published in the Register of Beneficial Owner.

Interested parties have the right to appeal against decision taken by the Administrator,²³ related to the limitation of access.

Supervision and sanctions

Non-compliance with the Beneficial Owner's disclosure obligation may lead to the imposition upon the entities of a fine ranging from Euro 1,250.00 to Euro 1,250,000.00, in case of:

- late filing for registration or modification of the Beneficial Owner's information;
- refusal to rectify Beneficial Owner's information further to a request to conform;
- providing knowingly inaccurate, incomplete or outdated information;
- not obtaining and not keeping updated information on the Beneficial Owner's at the entity's registered office.²⁴

Fines for the same amount are also imposed on the Beneficial Owners in case he/she does not provide the entity with its relevant personal information.²⁵

Impact on Companies

Entities shall put in place specific procedures in order to ensure compliance with Luxembourg transparency Beneficial Ownership requirements: this will trigger the adoption of organizational and compliance actions for companies, trusts and other legal arrangements

It should be noted that RBE Law provides for a specific sanctioned obligation on shareholders to identify themselves as the Beneficial Owners and to

²³ See RBE Law, Article 15 (5). Any interested party may lodge an appeal within 15 days of the publication of the Administrator decision, according to the procedure set out by Article 7, paragraph 3 of RBE Law. The appeal is brought before the judge presiding the Chamber of Trade in the relevant District Court in case the claimant is a business company and to the President of the competent District Court in case the claimant is a non-profit association, foundation, pension savings entity or agricultural association.

²⁴ See RBE Law, Article 20.

²⁵ See RBE Law, Article 21 (3).

provide the entity's directors or officers with the necessary information to enable the entity to fulfill the disclosure obligations with the Register of Beneficial Owner.

RBE Law contains several rules to guaranteeing compliance with EU Privacy framework. In particular, (i) it clearly identifies and attributes the various data treatment roles and responsibilities, (ii) it dictates specific rules for tracing the access to the Beneficial Owners Register and (iii) it excluded certain information present in the Beneficial Owners Register from the general public accessibility the accessibility. The careful approach adopted by the Luxembourg authorities is a clear evidence of the problem regarding the balancing between transparency and privacy that European States are facing in the implementation of Beneficial Ownership regulation.

Notwithstanding the above, it should be noted that RBE Law provisions granting to and regulating the general public access to the information registered in the Beneficial Owners Register have been recently object of a Request for a Preliminary Ruling to the EU Court of Justice. Among the various objections raised, the applicants claimed that the rules that grant to the general public access to the information in Beneficial Owners Register infringe the freedom to conduct business by allowing anyone to examine and analyze the shareholding structures, to reconstruct the way in which they organize their business activities and to know when natural persons become, or cease to be, shareholders of companies.²⁶

²⁶ Please refer to the request for a preliminary ruling advanced by the District Court of Luxembourg, in *G-Finance SARL, DV v. Luxembourg Business Registers* (C-317/21). The request questions the validity of the provisions establishing access to information on Beneficial Owners for the benefit of the general public. The applicants contested open access to information of a Beneficial Owner to any person under Article 30 of Directive 2015/849, without any requirement to demonstrate legitimate interest, further claiming that:

- (i) EU lacks competence to legislate on the access of the general public to the Register of Beneficial Owners, and that providing such access infringes the principle of proportionality (Article 5(4) TEU);
- (ii) establishing access of the general public to information on Beneficial Owners infringes the freedom to conduct a business (Article 16 of the Charter), as it can lead to aggressive economic intelligence practices;
- (iii) establishing access of the general public to information on Beneficial Owners may infringe the freedom of assembly and association (Article 12(1) of the Charter), the principle of equal treatment (Article 20 of the Charter), as well as leading to infringements of the right for private and family life and the protection of personal data under Article 52(1) of the Charter, while disclosure of data relating to the Beneficial Owners jeopardizes business secrecy, as the anonymity of transactions in

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a company's capital is no longer protected. No decision has been issued yet on this case.