

CLIENT ALERT

AUGUST 11, 2021

Disclosure of Beneficial Ownership in 2021 – Italy Perspectives – Alert 4 of the Series

Transposal of EU Beneficial Ownership Regulation into Italian law

Following up on previous Client Alerts of this series,¹ this Alert illustrates Beneficial Ownership's regulation in Italy. Legislative Decree no. 90/2017² and, more recently, Legislative Decree no. 125/2019³ have amended and supplemented Italian Legislative Decree no. 231/2007⁴ (Italian AML Law), transposing in the Italian AML Law the regulations concerning Beneficial Ownership provided for by Directives (EU) 2015/849 and 2018/843.

¹ For more information on previous Client Alerts prepared by Curtis Mallet-Prevost, Colt & Mosle regarding Beneficial Ownership regulation in the US, EU and France, visit <https://www.curtis.com/our-firm/news/international-insight-disclosure-of-beneficial-ownership-in-2021-france-perspectives-alert-3-of-the-series>, <https://www.curtis.com/our-firm/news/international-insight-disclosure-of-beneficial-ownership-in-2021-alert-2-of-the-series-general-eu-perspective>, <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 Legislative Decree no. 90/2017, *Attuazione della direttiva (UE) 2015/849 relativa alla prevenzione dell'uso del sistema finanziario a scopo di riciclaggio dei proventi di attività criminose e di finanziamento del terrorismo e recante modifica delle direttive 2005/60/CE e 2006/70/CE e attuazione del regolamento (UE) n. 2015/847 riguardante i dati informativi che accompagnano i trasferimenti di fondi e che abroga il regolamento (CE) n. 1781/2006*, available at <https://www.gazzettaufficiale.it/eli/id/2017/06/19/>.

³ See Italian Legislative Decree no. 125/2019, *Modifiche ed integrazioni ai decreti legislativi 25 maggio 2017, n. 90 e n. 92, recanti attuazione della direttiva (UE) 2015/849, nonché attuazione della direttiva (UE) 2018/843 che modifica la direttiva (UE) 2015/849 relativa alla prevenzione dell'uso del sistema finanziario ai fini di riciclaggio o finanziamento del terrorismo e che modifica le direttive 2009/138/CE e 2013/36/UE*, available at <https://www.gazzettaufficiale.it/eli/id/2019/10/26/>.

⁴ See Legislative Decree no. 231/2007, *Decreto Legislativo 21 novembre 2007, n. 231 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 misure di esecuzione*, as implemented by Legislative Decree no. 90/2017 and Legislative Decree no. 125/2019, (Italian AML Law). For more information visit <https://www.camera.it/parlam/leggi/>.

However, as described below, the Italian Beneficial Ownership legislative framework is still in progress and has not been finalized.

Article 21 of Italian AML Law⁵ delegates the details of the Beneficial Ownership discipline to a special decree to be adopted by the Minister of Economy and Finance (MEF Decree)⁶ - to be issued in agreement with the Minister for Economic Development, having prior consulted with the Personal Data Protection Authority. In particular, the MEF Decree shall - among other - establish:

- a) the data and information to be provided on Beneficial Ownership of companies, trusts and similar legal arrangements established or resident in the Italian Republic, as well as the procedure and terms to communicate any such information;
- b) the procedure to access Beneficial Ownership information by the Authorities⁷;
- c) the procedure for consultation by the public of the Beneficial Ownership information and the relevant accreditation requirements;
- d) the procedure (i) establishing causes for excluding access to Beneficial Ownership information, (ii) assessing the “*legitimate interest*” requirement for certain private parties to access the Beneficial Ownership information, (iii) establishing the appeal procedure against the administrative decision in case of rejection of the access’s request;
- e) the procedure for Obligated Entities⁸ to report any inconsistencies detected between the information available in the Beneficial Owner

⁵ See Italian AML Law, Article 21, Paragraph 5.

⁶ For more information on the MEF Decree, please visit <http://www.dt.mef.gov.it/it/dipartimento/>.

⁷ See Italian AML Law, Article 2 (a), which indicates as the relevant Authorities “*the Ministry of Economy and Finance, the Financial Intelligence Unit, the Anti-Mafia Investigative Directorate, the Guardia di Finanza acting through the Nucleo Speciale di Polizia*”.

⁸ Obligated Entities are defined by Article 3 of Italian AML Law and include credit institutions, financial intermediaries, insurance companies, 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 gambling services companies.

Register and the information on Beneficial Ownership acquired in the performance of their costumers' AML due diligence activities;

- f) the procedure regulating the inter-connection between the Italian Beneficial Owner Registers and the central registers held in other EU Member States.

On December 2019 the MEF published a draft decree according to which the deadline for the first filing with the Beneficial Ownership Register was set at March 15, 2021.

Many of the necessary procedural steps have been fulfilled, including obtaining the favorable opinion of the Italian Data Protection Authority on January 14, 2021.

In February 2021 the MEF submitted the draft decree, together with its technical annex, to the Council of State in order for the latter to express its opinion on the text. However, the Council of State pointed out certain procedural and legislative shortcomings, inviting the MEF to explain the reasons underlying several choices made, and it highlighted some lack of clarity that could potentially give rise to interpretative as well as practical uncertainties.⁹ For these reasons, the Council of State on March 19, 2021 suspended the examination awaiting for MEF information and clarifications, which – to date – have not yet been provided.

Therefore, although more than one year passed since the end of the public consultation which led to the adoption of the first draft of the MEF Decree, the Beneficial Owners Register is yet to become effective.

⁹ The Council of State's remarks on the MEF Decree were grounded, *inter alia*, on privacy concerns which were also raised in other Member States' jurisdictions. In particular, in Luxembourg a company recently appealed against the decision denying the permission to limit public access to its Beneficial Owner information on the grounds that the Luxembourg Beneficial Owners regulation infringes its fundamental rights, such as business secrecy and protection of personal data. The District Court of Luxembourg stayed the proceedings and requested the European Court of Justice to issue a preliminary ruling on the matter. Curtis will monitor the European Court of Justice rulings and issue an update on its decision. ,.

What entities are subject to Beneficial Ownership disclosure under Italian law

All entities¹⁰ that are bound to be recorded in the Company Register are required to file information relating to their Beneficial Owner, except the companies listed on a regulated market, those subject to disclosure obligations under the EU Law, or subject to equivalent international disclosure standards. Such information must be recorded in a special section of the Company Register.

According to Italian AML Law, entities shall obtain and keep, for at least five years, appropriate, accurate and up-to-date information on their Beneficial Owners.¹¹ The information shall be acquired by directors, who are required to identify the Beneficial Owner on the basis of corporate documentation such as accounting records, balance sheets, shareholders' register, and from any other data available.¹²

In case doubts remain on the identification, the directors are required to continue investigating - limiting however their investigations to those shareholders who appear to have the Beneficial Ownership requisites - by expressly requesting further details on the extent of their interest in the entity.

Who qualifies as Beneficial Owner under Italian law

According to Italian AML Law, the individual(s) who ultimately has direct or indirect ownership or control of the entity¹³ is considered to be the Beneficial Owner. In the event the entity is a company, the Beneficial Owner shall be identified as:

¹⁰ Please note that for the purpose of this Client Alert, entities includes trusts and other legal arrangements, which are subject to the same Beneficial Owner's disclosure obligations as provided for companies.

¹¹ See Italian AML Law, Article 22, Paragraph 2.

¹² See Italian AML, Article 22, Par. 3.

¹³ Please note that in FAQ Banca d'Italia clarified that in case a percentage greater than 25% of the share capital or voting rights in an entity is held by a shareholder who is not a natural person, the Beneficial Owner must be identified - going back along the shareholdings chain - in the individual/s who, in the final instance, exercise control over that entity. In the event that several entities control a percentage greater than 25% of the share capital or voting rights, the aforementioned criterion for identifying the Beneficial Owner applies to each of the entities.

- a) the individual holding more than 25% of the capital;
- b) the individual holding more than 25% of the capital through subsidiaries, trusts or nominees, in case of indirect ownership.¹⁴

When the application of the above-mentioned criteria does not provide for the unequivocal identification of the Beneficial Owner, directors shall search for the individual(s) exercising control over the entity by:

- a) holding the majority of votes at the shareholders' meeting;
- b) holding enough votes to exert a dominant influence at the shareholders' meeting;
- c) imposing contractual constraints which enable the individual(s) to exert a dominant influence on the company's business.¹⁵

Where neither the application of the above criteria allow for the unequivocal identification of the Beneficial Owner, Article 20 (5) of the Italian AML Law provides for a residual criteria according to which those vested with powers of legal representation, administration or management of the company shall be considered Beneficial Owners.¹⁶

In any case, entities shall keep records of every check and activity carried out for the identification of Beneficial Owners, especially where the residual criteria provided for in Article 20 (5) applies, making sure they provide explanations on the reasons why it was not possible to identify the Beneficial Owner through other criteria.¹⁷

Beneficial Ownership information – collection and access

Companies shall communicate to the Company Register the information relating to their Beneficial Owners to be included in a special dedicated section of the same Register.¹⁸

The provisions regulating the access to Beneficial Ownership information are generally in line with those of Directive (EU) 2015/849, but certain limitations are contemplated. Specifically, anyone can access the Beneficial

¹⁴ See *Id.* Par. 2.

¹⁵ See *Id.* Par. 3.

¹⁶ See Italian AML Law, Article 20, Paragraph 5.

¹⁷ See Italian AML Law, Article 20, Paragraph 6.

¹⁸ See Italian AML Law, Article 21, Paragraph 1.

Owner information collected in the Register (under payment of a fees), but access is limited to:

- name and surname;
- month and year of birth;
- country of residence and nationality;
- the criteria - according to Article 20 of Italian AML Law - used to identify the Beneficial Owner.¹⁹

Furthermore, access to Beneficial Ownership information may be excluded, partially or entirely²⁰

- if the access would expose the Beneficial Owner to a risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or
- in the event the Beneficial Owner is an incapacitated person or a minor, provided any such risk is deemed to be disproportionate compared to the right of access.

The exclusion shall be granted on case-by-case approach and only after undergoing a detailed assessment of the exceptional circumstances.

Supervision and sanctions

Failure to provide information to Company Register is sanctioned with a fine between Euro 103.00 and 1,032.00 as provided for in Article 2630 of the Italian Civil Code that generically sanctions every case of failure to provide information to the Company Register. The competent local office of the Chambers of Commerce which is entrusted with the Company Register records is also responsible for the formal checks on the Beneficial Owner's declarations filed and for the imposition of administrative sanctions.²¹

Finally, it should be noted that Italian AML Law also contemplates a civil sanction for the Beneficial Owner who refuses to provide information or provides inaccurate information. Article 22 (3) of the Italian AML Law provides that in case of (i) unjustified inaction or refusal by the shareholder

¹⁹ See Italian AML Law, Article 21, Paragraph 2 (f).

²⁰ Again, See Italian AML Law, Article 21, Paragraph 2 (f).

²¹ See Italian AML Law, Art. 21, Paragraph 1.

to provide the directors with the information deemed necessary for the identification of the Beneficial Owner and (ii) in case of providing information that is manifestly fraudulent, the non-complying shareholders cannot exercise their voting rights and, in case a shareholders' resolution passed with the non-complying shareholder's casting vote, the resolution can be challenged in Court and annulled.

Impact on Companies

As illustrated above, because of the delayed implementation of the MEF Decree, it is not yet possible to analyze the complete legal framework and evaluate the full impact of the Italian Beneficial Ownership regulations on companies.

However, from the general provisions of the Italian AML Law it clearly appears that all entities subject to the Beneficial Ownership disclosure obligation shall adopt specific compliance procedures and designate a director and/or an officer charged with the collection, the storage and the updating of the Beneficial Owner's information. This could lead to imposing the setting up of specific compliance mechanisms for monitoring the Beneficial Owners' data also for Small and Medium Enterprises.

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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