

COMPARATIVE STUDY

TRACING OF CORPORATE OWNERSHIP STRUCTURES UP TO BENEFICIAL OWNERS

**including information on companies which may be part of groups
engaged in tax avoidance**

This publication is supported by the European Union Programme Hercule III (2014-2020). This programme is implemented by the European Commission and it was established to promote activities in the field of the protection of the financial interests of the European Union. (for more information see http://ec.europa.eu/anti_fraud/about-us/funding/index_en.htm) The information contained in this publication does not necessarily reflect the position or opinion of the European Commission. It reflects the author's view and the European Commission is not responsible for the views displayed in the publications and/or in conjunction with the activities for which the grant is used.

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**TRACING OF CORPORATE OWNERSHIP
STRUCTURES UP TO BENEFICIAL OWNERS**

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Date of issue: December 2017

Legal status: December 2017

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0. The issue of opaque corporate ownership structures

The negative phenomena of corporate tax avoidance, financing of corruption and other criminal activities, state capture and ineffective competition on the market for public funds stem from a common problem: the possibility for legal entities to create global opaque corporate structures (multinational corporations)¹. With the exception of few countries with centrally planned economies or without the necessary infrastructures, any company can create a subsidiary in any country in the world and thus create a multinational corporation. The ownership structure of the multinational corporation can be transparent - so that it is possible for the authorities or the public to see all entities within this structure up to the ultimate beneficial owner² - or opaque. The opacity makes it possible to hide parts of these corporate structures in non-transparent jurisdictions, including the ultimate beneficial owner.

Theoretically, the existence of global opaque corporate structures creates is a problem of information asymmetry³. If, on the one hand, multinational corporations may extend their corporate structure to almost any country on the globe, on the other hand, the authorities cannot follow corporate structures of multinational corporations to all countries since companies may establish subsidiaries in countries which do not provide other countries with information on corporate ownership or do not keep records of corporate ownership in the form accessible to the public or authorities.⁴ This information asymmetry, in turn, results in ineffective law enforcement, including financing of economic criminality, corruption, conflict-of-interest and activities of third states subject to EU sanctions by public funds; corruption, bribery and conflict of interest plaguing management of public funds as well as to reduced corporate tax income⁵ caused by corporate tax avoidance.

¹ The term multinational corporation refers to a group of legal entities which are registered in more than one country and are owned by the ultimate beneficial owner(s). In the related proposal of a legal text it is referred to as a conglomerate.

² The ultimate beneficial owner can be a natural person, public entity (such as the state) or a fund-like structure without legal personality which owns and/or controls a legal entity or a multinational corporation.

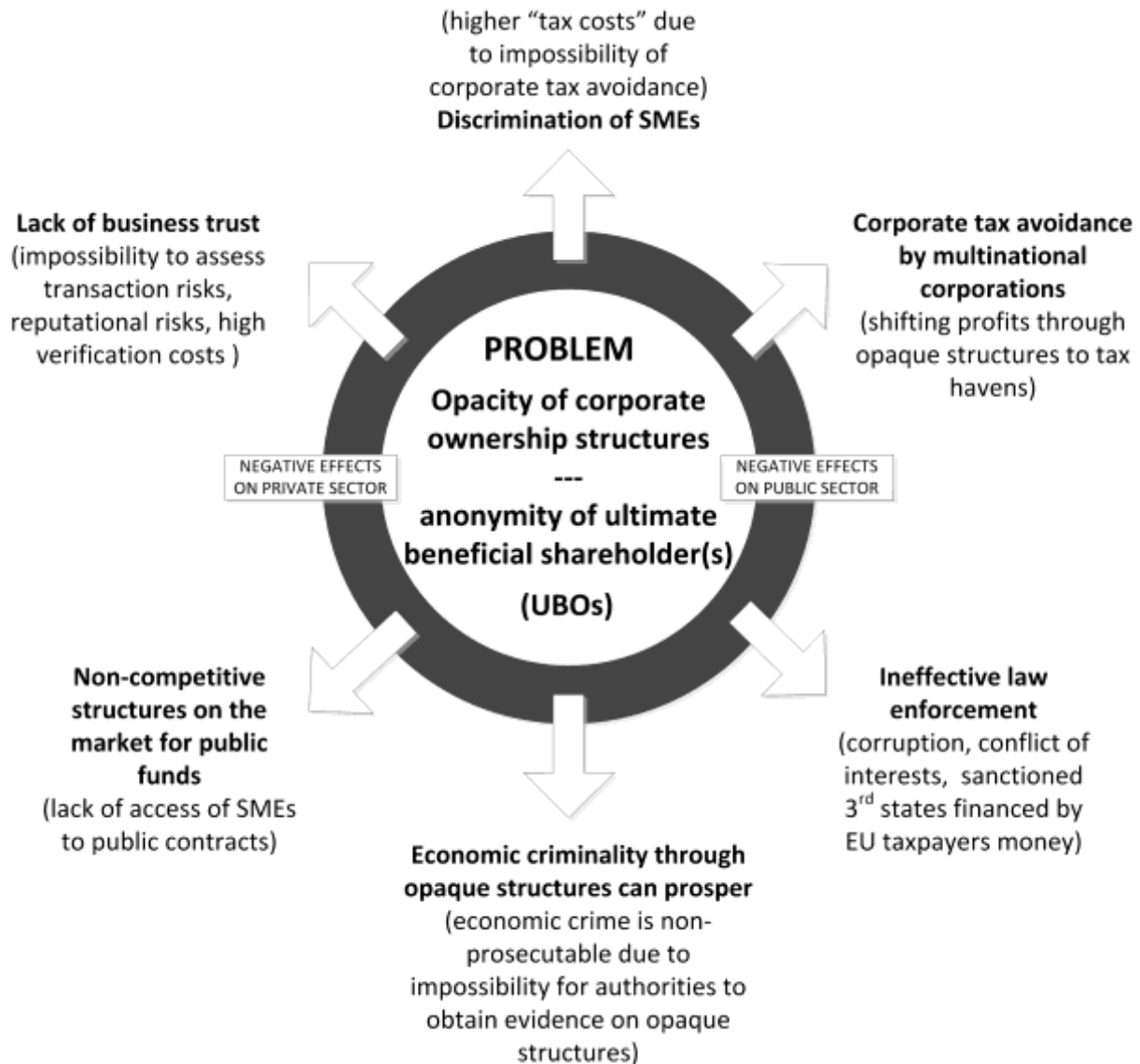
³ Economic operators know their global corporate structures, irrespective of whether they are transparent or not, whereas public authorities of EU Member States do not have this information.

⁴ “These issues are systemic and relate in many ways to the essence of the company form, which is largely replicated throughout international legal systems.” (Transparency & Trust – Enhanced Transparency of Company Beneficial Ownership, Department for Business, Innovation & Skills, Impact Assessment, 25 June 2014, p. 10).

⁵ Estimates of the amount held offshore are as high as USD 1.9 trillion (OECD Economic Surveys, United States, June 2014, p. 14)

Corporate opacity leads to financing of corruption, conflict of interest and other criminal activities by public monies, ineffective international sanctions, increased transaction costs and inflated prices of public investments. Discussions with enforcement agencies and a private sector fraud investigator have indicated that many cases of company misuse will involve complex webs of companies and other corporate structures incorporated in numerous different jurisdictions. This is supported by relevant literature on the misuse of companies⁶. So far, the efforts of Member States to overcome this problem are rudimentary without tackling the problem effectively.

Picture 1



0.1. The issue description

Opaque corporate structures can serve as a means of financing of economic criminality, corruption, conflict-of-interest and activities of third states subject to EU sanctions by public funds. OECD indicates that *"almost every economic crime involves the misuse of corporate*

⁶ Transparency & Trust – Enhanced Transparency of Company Beneficial Ownership, Department for Business, Innovation & Skills, Impact Assessment, 25 June 2014, p. 7.

vehicles [i.e. companies]”⁷ while an UK government paper suggests that „there is a clear link between such illicit financial flows and company structures”⁸. Opaque corporate structures present an obstacle to an effective law enforcement⁹. Moreover, it is more than paradoxical that anti-money laundering rules oblige private companies disposing with their private money to disclose ultimate beneficial owners in transactions over certain values, but do not require the same from public entities.¹⁰ Money of EU taxpayers paid out to the state can be disbursed to private entities which are part of opaque corporate structures which allow for channelling out these public monies to non-transparent tax havens¹¹. European Commission estimates proceeds from global criminal activities to reach 3,6% of GDP¹², United Nations figures of funds implicated in money-laundering equal 2,7% of global GDP¹³.

Realisation of corruption and bribery is regularly performed by use of corporate vehicles with opaque corporate structures. „A World Bank report last year [2011], *“the Puppet Masters”*, investigated 150 corruption cases. Almost all involved the misuse of corporate vehicles, such as companies and trusts, to the tune of USD 50 billion.”¹⁴ Due to the absence of effective

⁷ OECD (2011): Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes. “Slush funds are created for the collection and distribution of some huge sums of money that are required to participate in corrupt practices. [...] More sophisticated methods typically use bank accounts abroad, preferably in the offshore countries that allow non-transparent management accounts and ensure the anonymity of the ultimate owners. [...] These hidden funds, often containing vast resources, finance gray economy.” (OECD: Bribery in Public Procurement: Methods, Actors and Counter Measures, 2007, p. 32).

⁸ Transparency & Trust – Enhanced Transparency of Company Beneficial Ownership, Department for Business, Innovation & Skills, Impact Assessment, 25 June 2014, p. 7.

⁹ “In dozens of jurisdictions, from the British Virgin Islands to Delaware, it is possible to register a company while hiding or disguising the ultimate beneficial owner. This is of great use to wrongdoers, and a huge headache for those who pursue them. Anonymously owned companies can buy property, make deals (and renege on them), launch intimidating lawsuits, manipulate tenders – and disappear when the going gets tough. Those who seek redress run into baffling bureaucracy and a legal morass. Seeking real names and addresses means dealing with lawyers and accountants who see it as their job to shield their clients from nosy outsiders.” (The Economist, Corporate Anonymity – Light and wrong, 21 January 2014, p. 55).

¹⁰ Although Article 106 (1) of Financial Regulation (EU) No 966/2012 stipulates that economic operators or persons having powers of representation, decision-making or control over them are excluded from EU financing when they have been the subject of a final judgment for fraud, including tax fraud, it can be effectively applied only with difficulties since public officials have little or no chance of discovering those economic operators (such as Company B, C and the person of ultimate beneficial owner on Picture 4) since they have only knowledge about the legal person which whom they directly contract, but not about natural or legal person which control or own this legal person (on the basis of the Legal Entity Form) as there is no register from where they could find information about the latter persons. Same applies as regards implementation of financial instruments under Article 140 of this Regulation, in particular its Art. 140 (4).

¹¹ Mechanisms and schemes identical to those used for corporate tax avoidance are being used. The costs of “buying” corporate anonymity with companies providing offshore services start at EUR 1 000 per year.

¹² “The most widely quoted research dates back to the 1990s, when the International Monetary Fund (IMF), published a broad ranging estimate which quantified money laundering to be in the region of 2-5% of global GDP. In an EU context, if this range were extrapolated to the present day, with total EU GDP amounting to € 12.27 trillion, it could be assumed that the amount of money laundered funds was somewhere between € 245-613 billion (assuming an even distribution of money laundering globally)”. (Impact Assessment Report accompanying the proposal of the fourth Anti-Money Laundering Directive, European Commission, 5.2.2013, (SWD(2013) 21 final).

¹³ “More recent research has been published by the United Nations Office on Drugs and Crime (UNODC (October 2011): *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes: Research report*). The findings, which are broadly in line with the earlier IMF estimates, suggest that all criminal proceeds are likely to have amounted to some 3.6% of GDP or around US\$ 2.1 trillion in 2009, with an estimated amount available for money laundering equivalent to some 2.7 % of global GDP, amounting to some US\$ 1.6 trillion. With similar assumptions as above, the amount of money laundered annually in the EU could be estimated at around € 330 billion”. (Ibid.)

¹⁴ The Economist, Corporate Anonymity - Ultimate Privilege, 21 January 2012, p. 55.

rules requiring disclosure of corporate structures of entities receiving public money coupled with the low cost of creation of opaque corporate structures, the probability of discovery of fraudulent misuse of public monies through corporate vehicles is extremely low.

The first EU Anti-corruption Report published in February 2014 indicated that corruption practices consisting in diversion of public money paid out to companies with anonymous corporate structures for corruption is a problem at least in the Czech Republic, Croatia, Estonia, Latvia, Poland, Romania and Slovenia.¹⁵ Analysis of data on companies realising public contracts together with the data on companies sponsoring political parties in the Czech Republic show that each tenth company which was granted a public contract was directly sponsoring some of the political parties to the tune of about CZK 400 billion (cca EUR 15 billion)¹⁶.

From the behavioural perspective, a public official or a politician who (on his own account or for the benefit of a linked oligarch) secretly owns the company that will potentially win the tender will as a rule set the conditions of the public tender in a way that will allow him to maximise his profit rather than minimise the costs to the public purse. In other words, the public official or the politician will try to raise price of the public contract, not lower it, since the high price of the public contract is in his personal interest.¹⁷ The incentives for the public officials, politicians and connected clientelist networks to engage in the described behaviour depend on the probability that their shareholding interest in the company participating in the public tender would be discovered. This discovery probability will be influenced by the effectiveness of preventive rules – possibly requiring the disclosure of corporate structures of companies receiving public funds – and by the success rate of law enforcement bodies in convicting perpetrators of public money fraud committed via anonymous corporate vehicles. If the probability of discovery or conviction is low, the incentive to commit the described fraud will be very high.

Due to the absence of effective rules requiring disclosure of corporate structures of entities receiving public money and the possibility to hide parts of corporate structures, including ultimate beneficial owners, in non-transparent tax havens, the probability of discovery of fraudulent misuse of public monies through corporate vehicles is very low. Coupled with the low cost of creation and maintenance of such structures and the ineffectiveness of law enforcement bodies to prosecute and prove the existence of anonymous offshore structures, diversion of public monies can prosper as a relatively safe and profitable business. A non-negligible part of public budgets is thus wasted because it includes bribes for corrupt public officials and politicians and related clientelist networks¹⁸.

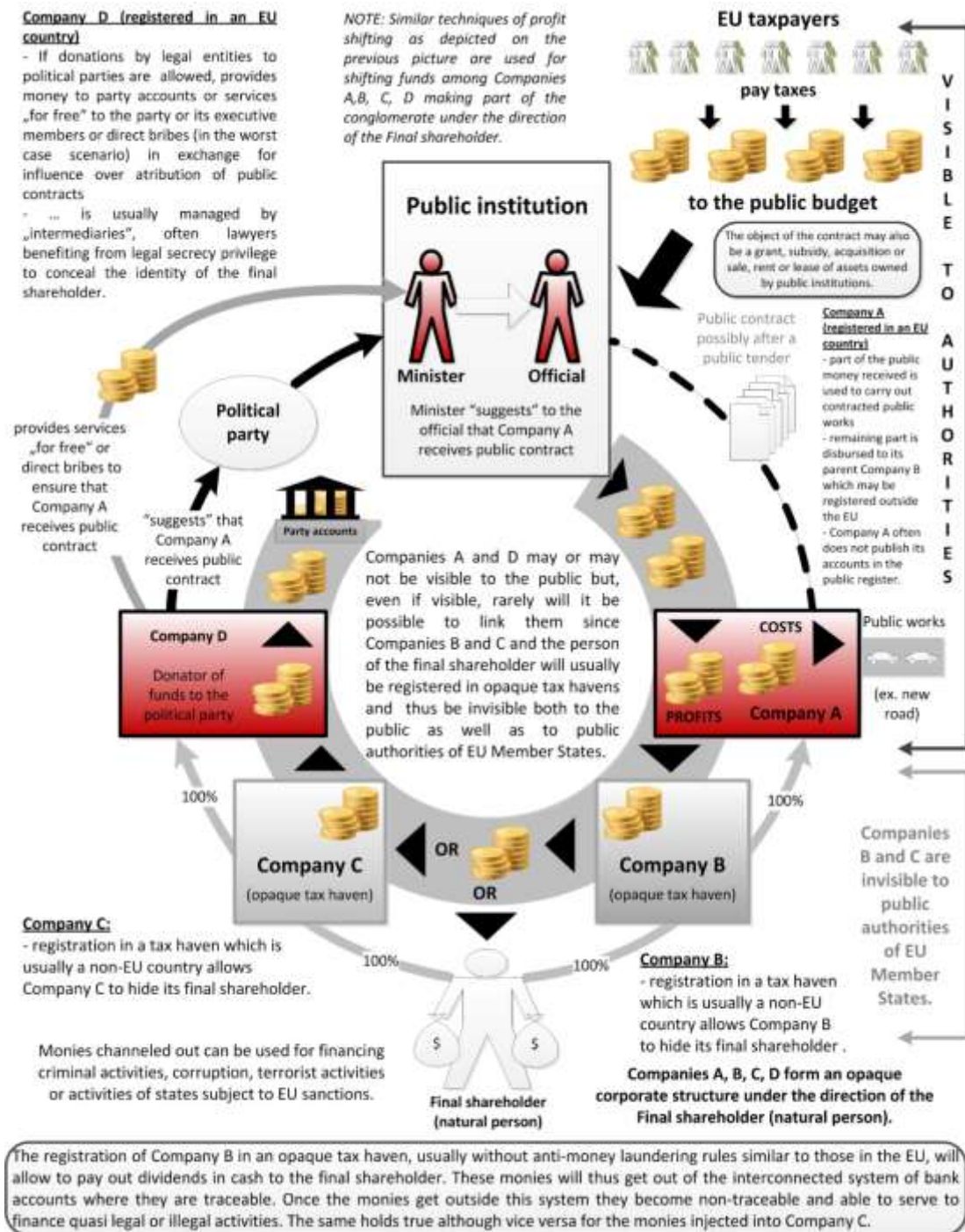
¹⁵ (COM(2014) 38 final (see the relevant country-specific annexes, section Issues in focus)).

¹⁶ The referred data analysis reflected only direct sponsoring, i.e. when company A which received a public contract was also a sponsor of a political party. It did not take into account a situation where company A would receive a public contract, but it would be its sole shareholder company B which would be sponsoring a political party. Hence, it can be reasonably assumed that sponsorship of political parties by companies and multinational corporations is much more frequent. (Titl, V., Palanský, M., Skuhrovec, J., Analysis of gifts by legal persons to political parties, Centre of Applied Economy – zIndex, 2014 available at: http://www.zindex.cz/data/polfin/2014-09-04-studie_dary_politickym_stranam_po.pdf)

¹⁷ To make the company he secretly owns win the public tender, the public official will set the conditions of the public tender in such a way that only few persons can participate; the price will not be the principal criterion, and technical and economic requirements will be tailored to certain tenderers.

¹⁸ „Mere fact that simple commercial transactions are being routed via fictitious companies in tax havens which are interposed into these transactions as intermediaries can be an indication that buying prices are inflated and selling prices reduced so that the difference can be used for an undue enrichment of an ultimate beneficial owner

Picture 3: Description of a mechanism for financing illicit activities by public money



Previous¹⁹ as well as existing²⁰ anti-money laundering rules can be easily circumvented. Illegitimate business has developed a number of tools how to avoid these rules, such as, manipulating the names of shareholders on shareholders' lists, payments of dividends in cash,

of such company or used as a bribe.“ (OECD: Bribery in Public Procurement: Methods, Actors and Counter Measures), ISBN 978-92-64-01394-0, OECD Publishing, 2007, p. 31).

¹⁹ Third Anti-Money laundering Directive 2005/60/EC (OJ L 309, 25.11.2005, p. 15), Implementing Commission Directive 2006/70/EC (OJ L 214, 4.8.2006, p. 29), Regulation (EC) No 1781/2006 on information on the payer accompanying transfers of funds (OJ L 345, 8.12.2006, p. 1).

²⁰ Proposal for a the fourth AML Directive (COM(2013) 45 final).

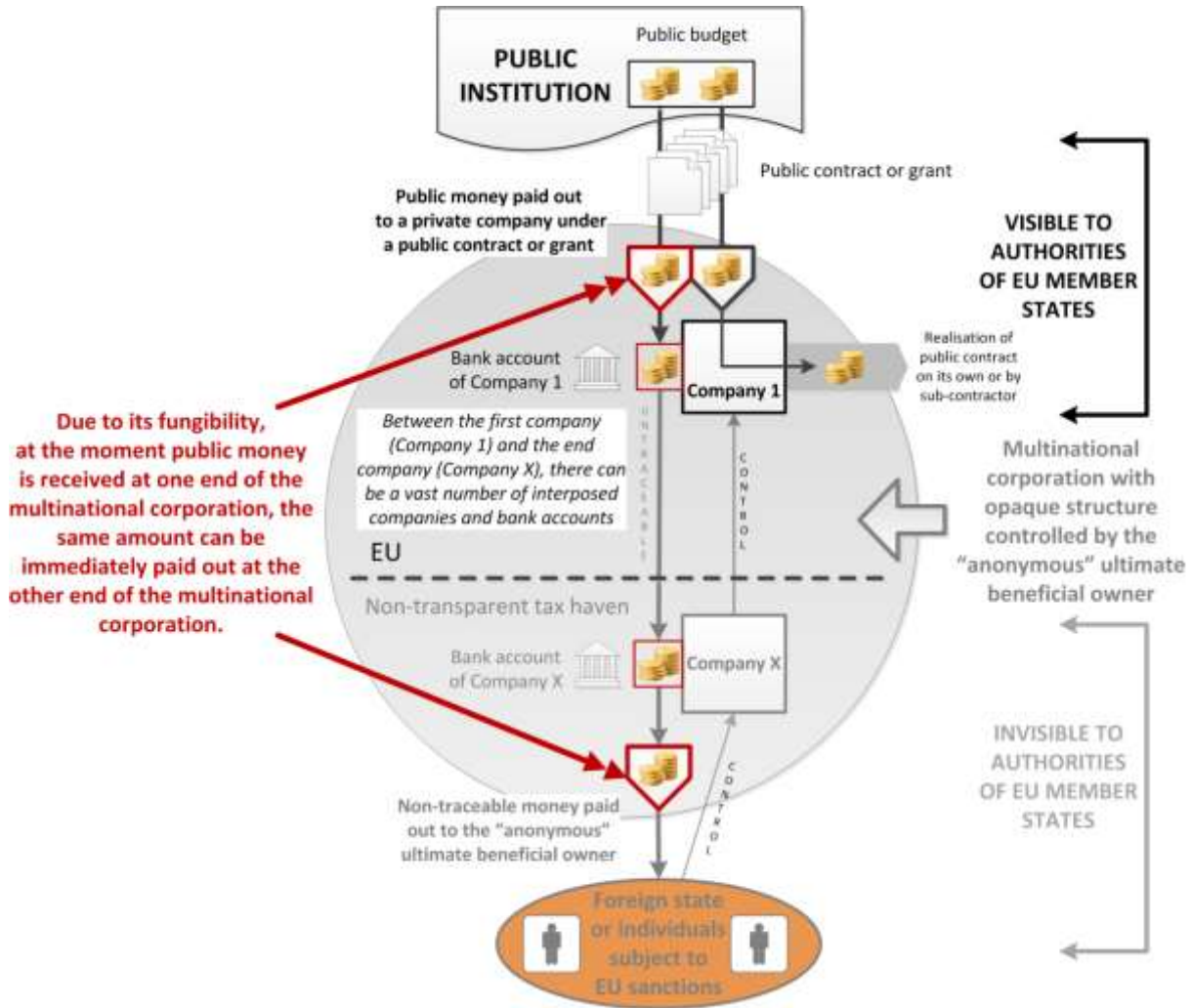
use of „white horses“, „reverse controlling shareholder agreements“²¹, trusts, and making use of lack of discipline and control over persons covered by anti-money laundering rules other than credit and financial institutions.²² EU anti-money laundering rules by their nature concentrate on the flows of money generated by criminal acts which are later „invested“ in order to conceal their origin, but not on reverse flows which finance criminal activities (with the exception of terrorist activities). Thus, anti-money laundering rules are largely incapable of preventing and containing public money diversion.

The root cause of the problem lies in the fungibility of money in the corporate structure. If the corporate structure is opaque, the money entered into such structure becomes untraceable. At the moment, money is paid out from the public budget or from the budget of a public entity to a private company; the same amount of money can be paid out from any company with which the first company forms a multinational corporation. If the „ends“ of this corporation receiving public money are unknown, and hence it is not clear to whom the money from the corporation is paid out, public money can serve as a means of financing unknown potentially illicit activities.

²¹ Reverse controlling shareholder agreement means an agreement by which a shareholder having less than 25% of the company capital concludes an agreement with shareholders having higher stake in the company that it would be the former who will take most of the profits from the company and control over the company – disproportionately to the amount of his/her share capital. Thus, minority shareholder can control the company without being caught by the anti-money laundering rules which require disclosure of shareholders with at least 25% of share capital. Although potentially in breach of the principle prohibiting the abuse of minority or majority of shareholding rights, given the collusion of the parties to such agreement there is no incentive for either of them to invalidate such agreement. Alternatively, these shareholder agreements are concluded in jurisdictions whose rules do not contain this principle.

²² “For example, under the UK’s anti-money laundering (AML) regime, banks, lawyers, accountants and other professional bodies (“regulated entities”) are required to apply customer due diligence measures before entering into a business relationship with a company, including identification of the beneficial owner(s). However, regulated entities have told us they can struggle to fulfill this requirement, finding it difficult to obtain the information from the company or through other means. [...] The regulated entities go on to say that where services are refused, the company may look to find a service provider who does not apply due diligence, or does so to a lesser degree”. (Transparency & Trust – Enhanced Transparency of Company Beneficial Ownership, Department for Business, Innovation & Skills, Impact Assessment, 25 June 2014, p. 11); The Czech experience with the same issue is very similar and, in addition, obliged entities other than banks, such as lawyers, report only very few cases – between 2013 – and 2014 all Czech lawyers together reported altogether 20 suspicious cases each year: http://www.lidovky.cz/advokati-hlasi-zlomek-podezrelych-transakci-nemuzeme-je-kontrolovat-stezuje-si-fau-g3a-zpravy-domov.aspx?c=A140505_165937_ln_domov_ogo)

Picture 4

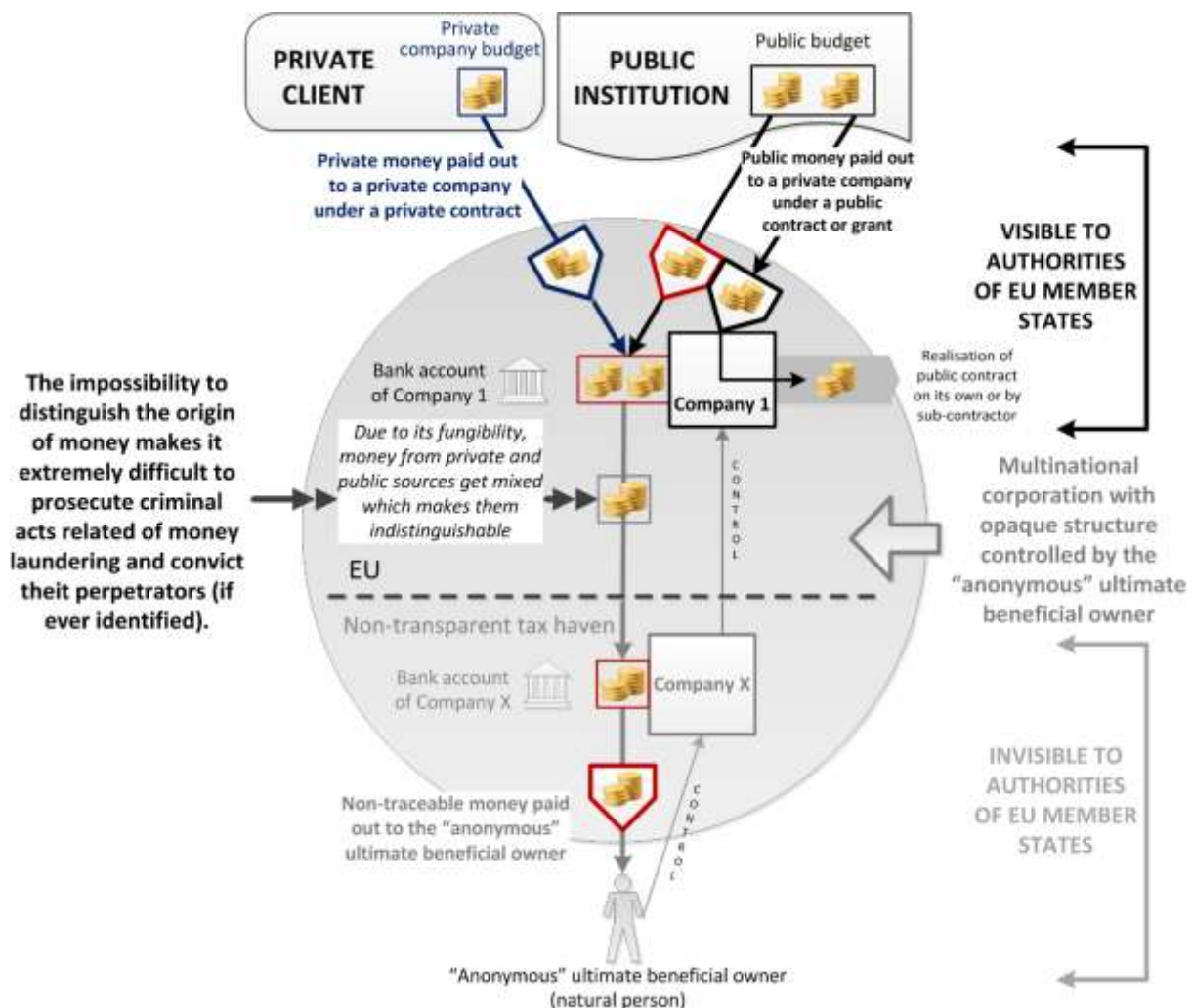


Unfortunately, neither the efforts at the EU level under the recently adopted 4th Anti-Money Laundering Directive aimed at establishing the register of ultimate beneficial owners will not bear adequate results since this Directive failed to define what is the “corporate and control structure” and the “beneficial interest” (which is in fact the same notion as the “corporate and control structure”). Thus, as the competent Member States authorities will not be able to determine what kind of concrete information on “beneficial interest” to require from the legal persons and how to evidence that the effectiveness in disclosing the corporate and control structure up to the beneficial owner remains questionable. Yet, it is fair to admit that the U.S. administration is currently facing the same problems as the Member States’ administrations. The following table outlines the levels reached by Member States in different areas in disclosure and surveillance of corporate and controls structures of beneficial owners.

Moreover, due to their fungibility the public money paid out to a private company get mixed there with the „private money“ received by this company from other sources. The originally public money thus become untraceable. If a company which is a part of a multi national corporation receives certain amount of public money and the same amount of money is paid out from a different part of the multinational corporation, for example for financing a criminal activity, it is extremely difficult or even impossible to prove the causal link between the reception of certain amount of public money at one end of the multinational corporation and their disbursement from another end of the multinational corporation, in particular if the

„other ends“ of the corporation are unknown due to the use of anonymous corporate structures.²³

Picture 5 – Mixing of money in an opaque corporate structure



The combination of the effects fungibility of money from private and public sources and within the opaque corporate structure makes prosecution of money laundering and uncovering fraud schemes involving public money often ineffective or outright impossible.²⁴ Indeed, neither administrative authorities nor criminal prosecution authorities of EU Member States have means to obtain information on corporate structures and related corporate accounts from other states, sometimes even if the documentation about these structures or accounts are kept

²³ World Economic Forum (2013): *Organised Crime Enablers*: "Law enforcement agencies have been handling an increasing number of cases in which legitimate businesses co-mingle with illegal businesses, and legitimate funds with illicit funds. Reconstructing these complex corporate schemes and identifying who lies behind them, i.e. identifying their beneficial owners (BO), is considered to be essential to reveal the full extent of the criminal infrastructure and to prevent future criminal activities."

²⁴ „[W]here illicit activity is suspected it can be very difficult to prove that the individual suspected of benefiting from the shares or company in question is actually the beneficial owner. This can have an adverse impact in terms of the amount of time and resource expended in investigating a case; but also in terms of the ultimate case outcome (e.g. the ability to prosecute successfully). Law enforcement agencies say the opacity of current beneficial ownership arrangements is a significant barrier to tackling money laundering and successfully recovering stolen assets“ ((Transparency & Trust – Enhanced Transparency of Company Beneficial Ownership, Department for Business, Innovation & Skills, Impact Assessment published 25 June 2014, p. 11).

by authorities of other EU Member States²⁵. This makes prosecution of criminal acts related to money-laundering and financing of criminal or terrorist activities – as well as judicial conviction of their perpetrators - extremely difficult, resource consuming and often ineffective²⁶.

Corporate opacity can also be a means of financing activities of third states or individuals subject to EU sanctions²⁷. Although the competent authorities have the obligation to make sure that sanctioned persons are not involved in economic transactions, including transfers of public funds to private entities controlled by these persons, and share this information, authorities have no or very limited means to obtain information about whether legal entities are effectively controlled or owned by the sanctioned individuals. If such an individual, for example, owns or controls an entity receiving public money from EU taxpayers, he just selects a country which does not register or communicate information about corporate ownership to EU or Member States authorities to avoid effects of these sanctions and continue to control or own entities receiving public money from EU taxpayers²⁸.

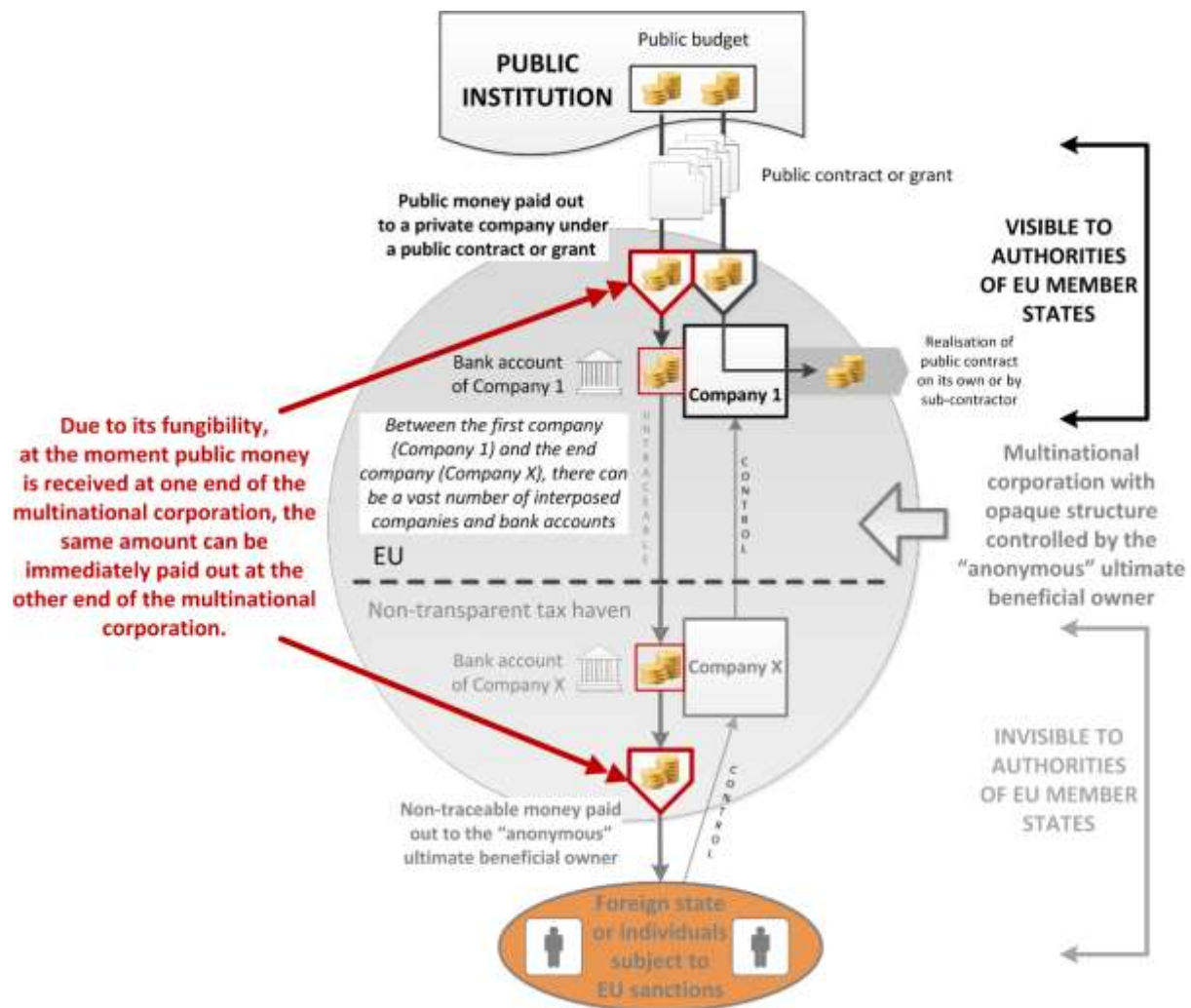
²⁵ The Serious Fraud Office (SFO) and Metropolitan Police Service (the 'Met') have highlighted a number of cases in which UK and/or overseas-incorporated companies are used to channel illicit funds through the UK; hold UK assets such as property; or perpetuate fraud involving UK citizens. Amounts up to £50m can be involved in such crimes. Recovering the proceeds of such crimes can be incredibly difficult - if not impossible - not least because of the multi-jurisdictional nature of the various companies involved in the ownership chains. (Transparency & Trust – Enhanced Transparency of Company Beneficial Ownership, Department for Business, Innovation & Skills, Impact Assessment, 25 June 2014, p. 10)

²⁶ Whether, in which time framework and quality will the authorities of one (EU) state provide authorities of other (EU) state is often difficult to predict for the demanding authorities. Often demanding authorities are discouraged to request such information due to these administrative difficulties.

²⁷ “[Europe] turns a blind eye to dirty money in the same way as it had once ignored money flow from the former colonies. We simply do not want to see certain problems and take responsibility for their solutions. [Russian] oligarchs could not exist without the support of the international monetary system.” (In the trap of Putin’s ideas (Krastev, I. – Bulgarian policy researcher), Respekt, 26 May – 1 June 2014, p. 51).

²⁸ Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, dated 8 December 2003 (15579/0), as amended by doc. 9068/13 dated 30 April 2013 in relation to the notion of ownership and control (subheading "Compliance", p. I to V after para 55).

Picture 6 – Financing of activities of individuals or third states through public funds



Corporate opacity allows entities with opaque corporate structures to control access to public tenders and prevent bid rigging strategies to be discovered. Multinational corporations with opaque active structures active on the market for public funds are able to engage in collusive practices²⁹ resulting in state capture: this translates into artificially inflated prices on the market for public funds market which, in turn, allows for excessive premia for multinational corporations³⁰, not seldomly channelled out through opaque corporate structures to non-transparent tax havens³¹.

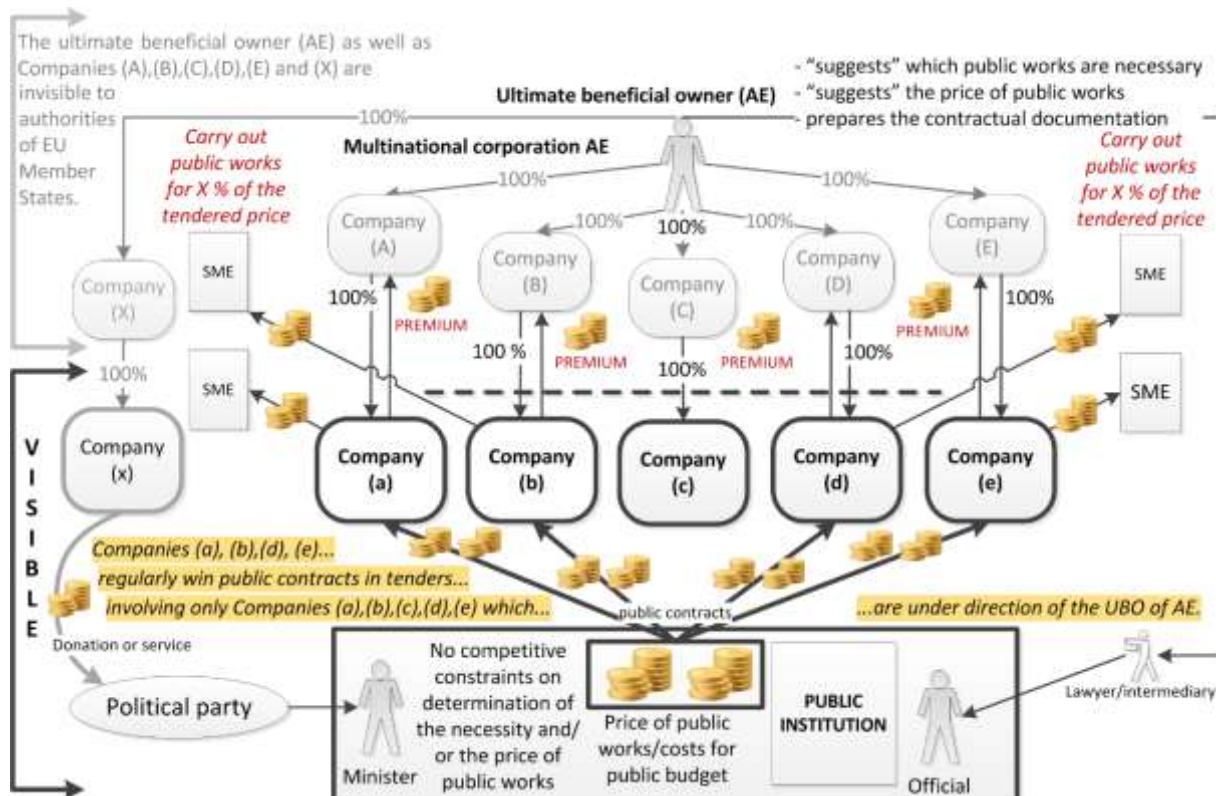
²⁹ "Collusion is a joint effort by potential competing suppliers to maximise their profit. Collusion in public tendering processes can involve foreign as well as domestic suppliers, and can occur with or without the presence of corruption. The most common collusive practice in public procurement is bid-rigging, in which firms coordinate their bids on procurement or project contracts. They may agree to submit common bids, thus eliminating price competition. Alternatively, firms may decide which firm will submit the lowest bid and agree to rotate in such a way that each firm wins an agreed number or value of contracts. Sub-contracting to a losing bidder may be used as a compensation mechanism." (OECD: Bribery in Public Procurement: Methods, Actors and Counter Measures), ISBN 978-92-64-01394-0, OECD Publishing, 2007, p. 32).

³⁰ "Shareholding structure of the tenderer is a highly relevant factor in determining the cost effectiveness and transparency of public contracts. Profitability of companies with non-transparent shareholding structure in public contracts is 20 to 73% higher than the profitability of equivalent entities participating in public contracts

The described arrangements of state capture and collusion causing excessive waste of public resources cannot be discovered without an actual knowledge of the corporate structure up to the ultimate beneficial owner of companies receiving public funds by the relevant authorities.

Example (vertical silo): The first example refers to the so-called vertical silo situation. In this situation a non-competitive company on the standard market is able to have a monopoly on certain specific part of the market for public funds, for example, a provider of an IT-system to a ministry or state agency.

Picture 7 – Example of a monopoly on the market for public funds which for authorities appear as perfect competition



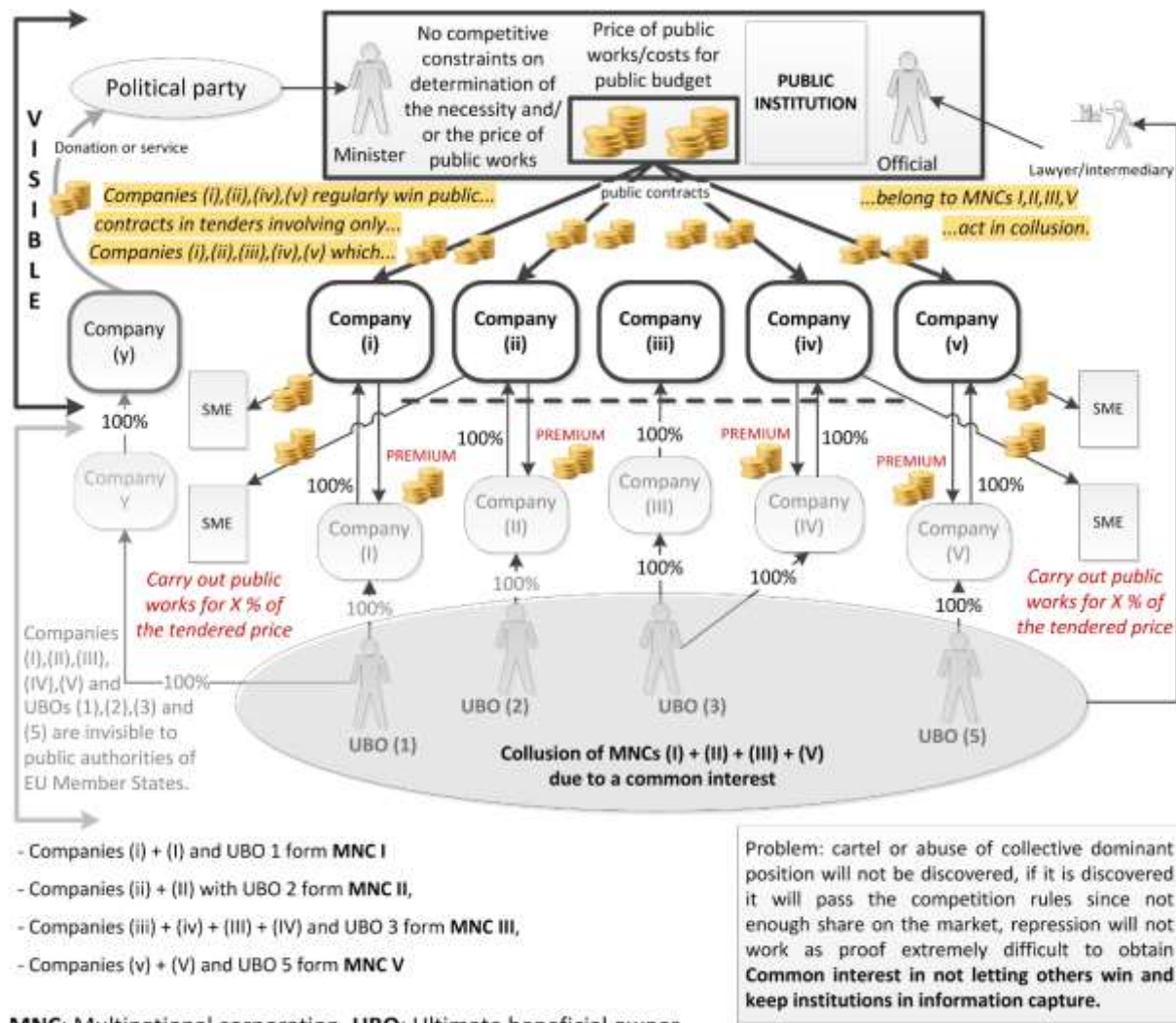
A company manages to monopolise IT contracts attributed by the ministry, for example, by the following means: (i) it provides sponsorship to the party controlling the ministry or state agency (either in a way that no links between the company receiving public contracts and the

with a transparent shareholding structure.” (zIndex - Case study: Profitability of firms with paper bearer shares in public procurement (published on 15 May and 30 August 2011).

³¹ According to the case study of Centre for Applied Economy of the Charles University in Prague from „Revealing corporate structures of public contractors“ (October 2013, available at www.zindex.cz) Czech companies which concluded public contracts in the Czech Republic between 2009 and 2012 in the total value of CZK 117 billion (EUR 4,25 billion) had in 10% an opaque corporate structure with anonymous ultimate beneficial owner and in 42% the corporate structure extended outside the Czech Republic to countries where the remaining part of the corporate structure or the ultimate beneficial owner was not possible to find. Another study performed by Transparency International Czech Republic together with BISNODE found that around 300 companies with corporate structures leading to tax havens was realising public contracts for the total value of around CZK 153 billion (EUR 5,5 billion) of which cca CZK 6 billion (EUR 220 million) originated from EU funds; at the same time there was 330 companies with unknown corporate structure realising public contracts for the total value of around CZK 40 billion (EUR 1,5 billion) of which cca CZK 9 billion (EUR 300 million) originated from EU funds. Moreover, this information need to be read in the context of evidence quoted under footnotes 67 and 69.

company sponsoring the party cannot be discovered or directly), (ii) arranges the tendering procedures in a way that in the statistics it looks as if there were a perfect competition (so that there is no reason for law enforcement authorities to start to prosecute possible corruption), (iii) indicates to the authority which public works it needs as well as its price (in order to cover development of its products), (iv) prepares contractual documentation for the public contract so that in the statistics the ministry or state agency can show it made savings (on the officials which were formerly drafting these contracts), (v) tries to agree with SMEs that they do not compete in public tenders (in order not to bring the offered price down) and in exchange sub-contracts to these SMEs parts of the attributed public contracts.

Picture 8 – Example of a collective dominant position or a cartel on the market for public funds which for authorities appear as perfect competition³²

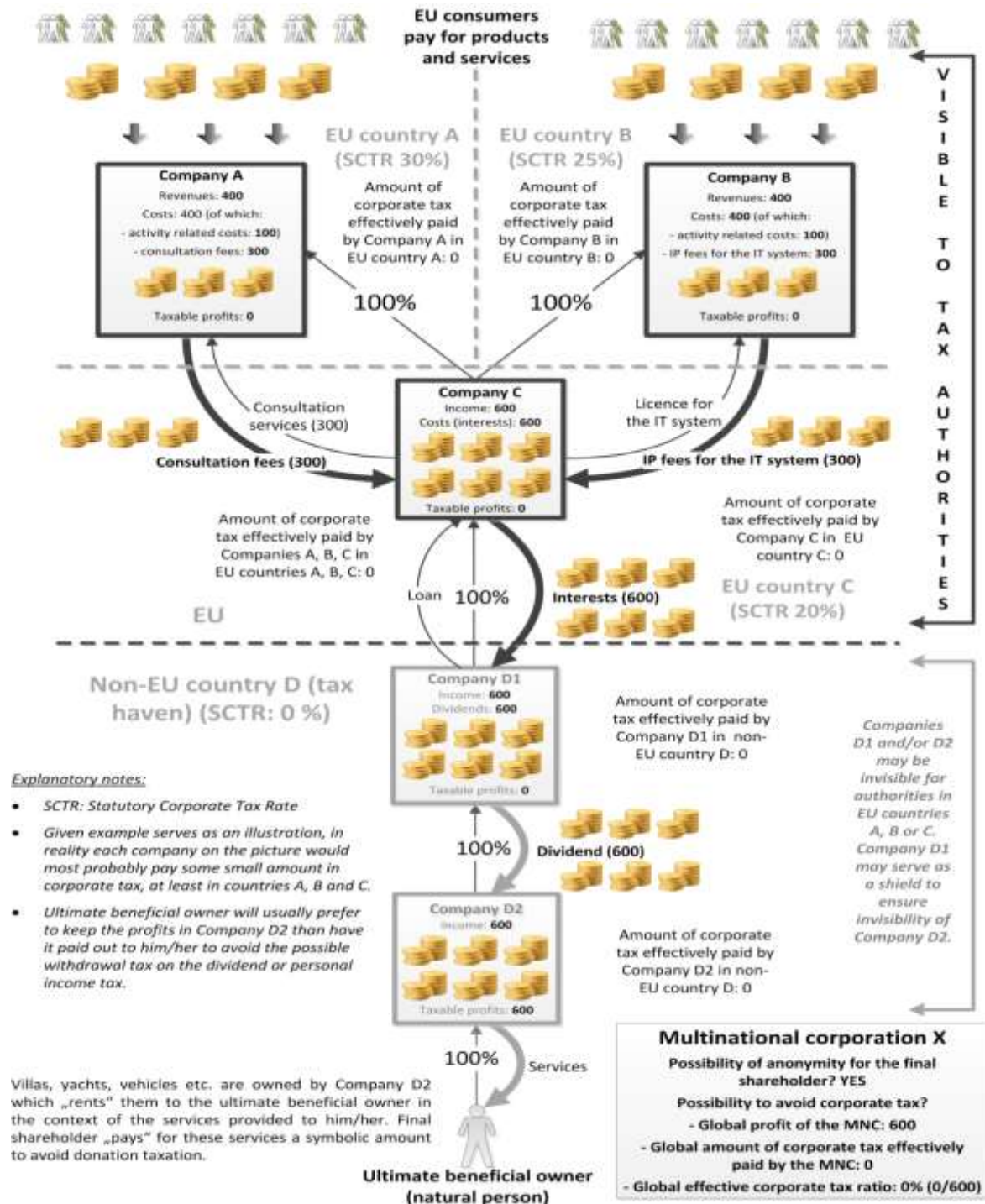


Last but not least, if it is considered immoral that companies with non-transparent corporate and control structures engage in practices of corporate tax avoidance, it is even more serious that such companies receive public subsidies and that due EU and Member States` authorities give public money to such corporations. Companies whose corporate ownership structure and global effective corporate tax rate cannot be established or is not above certain level should

³² This scenario refers to the „Rath case“ in which the rigging of the public market could have been discovered by public prosecution authorities since no opaque corporate structures were used.

not have access to public funds.³³ Such transparency could increase direct access of SMEs to public contract and grants, and thus increase their revenue also from public sources. Due to better information on the competitive structures on the market for public funds and resulting more intensive competition on this market, savings of public funds could be expected. These savings would either materialise in the form of reduction of amounts of inflated public spending or in the form of getting more for the same amount of money.

Picture 9



³³ Corruption: Not only a fiscal problem and its solutions in Collection of texts of a working group for the fight against corruption, Czech National Economic Government Council, June 2011, p. 47.

0.2. Regulatory environment for corporate ownership structures and beneficial ownership

0.2.1. Direct ownership and public registers

The existence of a legal person, including the information about its name, registration number, address and its management or supervisory body, can always be proven by an excerpt from a public registry. No legal person can exist without being registered in a public registry. The interest in legal persons, which laws of most countries qualify as an ownership interest or a membership right, is in almost all countries evidenced by a paper document or an electronic record. An ownership interest in a legal person can be evidenced above all by a record from a public registry; however, depending on the type of a legal person such evidence of ownership interest may not always be available.

Information on the corporate structure of companies is not confidential. Its accessibility and credibility is however variable, depending on the accessibility of the public register, availability of the data on shareholders of the companies in the given public register and the legal value of the information about the shareholders.

Directive 2009/101/EC foresees disclosure of certain minimum information about companies, such as instruments of constitution, identity of directors, supervisors, capital subscribed, certain financial documents, the registered office etc. However, this Directive does not require the public disclosure of information about shareholders – neither in the public information nor in the disclosed documents. Although certain Member States, in the absence of harmonised rules, adopt their own requirements for corporate structure disclosure the conditions of this disclosure vary significantly: both in terms of whether direct, indirect and/or ultimate shareholders should be disclosed as well as whether shareholders with any interest or qualified interest have to be disclosed.³⁴

Due to the absence of harmonisation of disclosure of corporate structures at the EU level, multinational corporations can create structures leading to jurisdictions which do not require disclosure of the identity of shareholders. Thus, they can escape requirements on the identification of shareholders and extend their corporate structures to states within or outside the EU which allow for anonymous ownership. Therefore, even companies established in fully transparent countries (from the ownership point of view) can be effectively anonymous and the authorities of these fully transparent countries cannot verify who is the ultimate beneficial shareholder of companies with a ownership structure reaching to less transparent countries, whether or not are they EU Member States³⁵.

Eventhough certain Member States are aware of the described gap in the aforementioned rules and foresee an obligatory disclosure of corporate structures up to the ultimate beneficial owner for private entities which contract with the state or receive money from public budgets,

³⁴ Legislation of certain Member States add additional information to be contained in the annual accounts beyond the requirements of Directive 2009/101/EC, such as information on shareholders. For example, the Czech legislation prescribes that in the note on the accounts (which makes part of documents which companies have to disclose in the commercial register) the companies indicate the identity of their shareholders if these hold more than 20% of share capital in the Czech company.

³⁵ For instance, a French société anonyme whose shareholders (direct owners) have to be registered on a securities account kept by a regulated entity can have as shareholder a Swiss or Luxembourg company whose shareholders do not have to register their identity on any securities accounts.

these rules are disparate, incoherent and not consistently enforced.³⁶ If public entities do not check who are ultimate beneficial owners of private entities with whom they conclude public contracts or give them public monies, they are disbursing taxpayers money into a blackbox from which corruption, criminal or terrorist activities can be financed³⁷.

0.2.2. Other sources of information on direct corporate ownership

If a statement of the public registry cannot serve as the relevant legally binding document evidencing the scope and nature of interest in a corporate entity (company) and their owners, either because it does not contain information on interest and their owner(s) or because such information is declaratory only, other documents may fulfill the role of the relevant legally binding evidencing documents. On the one hand, holding or ownership interest or membership interest in legal persons can be in most of the countries of civilized world evidenced by some type of a document. Ownership or quasi-ownership right to any asset, including share or membership interest, is normally evidenced in a written or electronic form. On the other hand, neither EU antimoney laundering rules nor FATF guidelines stipulate by which documents interests and their owners should be evidenced. Documents evidencing ownership interest or membership interest in a legal person are sometimes public, sometimes not: rules public availability of documents evidencing information about interests in legal persons and their owners are very laxatory on this issue across the EU as well as in third countries.

Also with respect to certain legal persons there can be more than one document evidencing the interest so that assessment as to which of the evidencing documents prevails over the other, i.e. has stronger legal force, has to be done. These legally binding evidencing documents will be in respect of joint-stock companies with book-entry shares, documents relating to those book-entry shares, and with respect to investment firms including funds with units in book entry-form, documents relating to those units in book-entry form. In addition, joint-stock companies with paper bearer shares, in jurisdictions where these shares can still exist, may put such bearer shares into an irreversible deposit, kept, for example, by a bank or notary, and use the deposit confirmation as an evidencing documents issued by a third-party (a de facto immobilization of such shares).

By contrast, if a company has registered paper shares, then to evidence the shareholder interest, the list of shareholders accompanied by a copy of the share certificate and a declaration of honour that these copies reflect the originals should be delivered; when a company has paper bearer shares, where the ownership cannot be easily determined, it should put these shares into an irreversible deposit, a de facto immobilisation of such shares since otherwise their owner will not be identifiable. The owner and the ownership of bearer paper shares in irreversible deposit will then be proven by the confirmation from a bank about the fact that these shares were put into such deposit.

Regarding non-profit legal persons, the membership interest therein, or more precisely the membership, will be proven either by a memorandum of association or a list of members. In

³⁶ See, for example, the study of Frank Bold „Public Money and Corruption Risks – A Comparative Analysis“ (2013) analysing differing corporate disclosure rules for legal persons contracting with public entities in the Czech Republic, Slovakia and Poland.

³⁷ Skuhrovec, J., "Getting naked" is obligatory already for two years but no one actually does it – How the state paid out 44 billion in grants without knowing to whom (in Czech: "Svlékání do naha" už je povinné dva roky, jen se nikdo nesvléká - Jak stát vyplatil 44 miliard dotací, aniž by vědel komu) (<http://blog.aktualne.cz/blogy/jiri-skuhrovec.php?itemid=23160>).

respect of trust-like or fund-like arrangement the evidence about the interest in such an arrangement will be proven by a notarial deed establishing such arrangement and a copy of the list of beneficiaries.

0.2.3. Beneficial ownership and beneficial ownership registers

Directive 2015/849 does not define the corresponding notions of ownership and control structure or the notion of the beneficial ownership interest. Yet, it imposes upon financial institutions and DNFBPs the obligation to check the control and ownership structure of their clients³⁸ and upon all legal persons the obligation to register in the newly created registers of beneficial owners their beneficial ownership interest next to their beneficial owners.³⁹ In addition, the Directive stipulates that the information on beneficial owner and the nature and extent of the beneficial interest held be accessible to public authorities, obliged entities and any person or organisation that can demonstrate a legitimate interest.⁴⁰

However, Directive 2015/849 provides a sufficiently clear and precise definition of the beneficial owner, which is based on the FATF definition, but adds in respect of different corporate subjects, namely corporate entities, trusts and non-profit legal persons, the indications of the persons who shall be considered as beneficial owners in relation to these corporate subjects. Regarding the corporate entities it also provides an exception for companies listed on a regulated market that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information and defines what direct ownership⁴¹ and indirect ownership⁴² means, setting under both definition a threshold of 25 % plus one share of the shares or voting rights or ownership interest in that entity as the limit above which the shareholding interest is relevant for consideration as an element of direct or indirect ownership.

Next to Directive 2015/849 which applies only to private persons, not to public organisations, EU legislation deals with the issue of identification of persons with control over legal persons contracting with EU bodies and authorities of Member States in the area of public contracts, grants and subsidies. Regulations 966/2012 and 1068/2012 and Directive 2014/24 stipulate in almost an identical way that persons with control over the tenderer or recipient of a subsidy should not be in one of the exclusion situations.⁴³ Participants in public procurement tenders can prove that they or the persons which control them are not in any of those situations by a declaration of honour which can take a form of a self-declaration called the European Single Procurement Document.⁴⁴

³⁸ Art. 13 (1) (b) Directive 2015/849.

³⁹ Article 30 (1) Directive 2015/849.

⁴⁰ Article 30 (5) Directive 2015/849.

⁴¹ A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a natural person shall be an indication of direct ownership.

⁴² A shareholding of 25 % plus one share or an ownership interest of more than 25 % in the customer held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership.

⁴³ *I.e.* that they were not convicted by a final judgment or a final administrative decision that they for (i) misrepresentation, (ii) violation of competition rules, (iii) violation of intellectual property rights, (iv) undue influence of the tendering process, (v) fraud, (vi) corruption, (vii) participation in criminal organisation (Art. 57 (1) Directive 2014/24).

⁴⁴ If the tenderer, or a person controlling a tenderer is in of the situations defined under points (i) to (vii) of letter a) above, the contracting authority has to exclude him from the public contract. (Art. 57 (1) Directive 2014/24).

Winning tenderers or applicants are then obliged to provide a confirmation that the declaration of honour is still correct. Practically, to fulfil the legal requirements prescribed by the Regulations 966/2012 and 1068/2012 and Directive 2014/24 the contracting authority should first check who are the persons with control over the tenderer or the applicant. Second, the contracting authority should verify whether the tenderer or the applicant and their controlling persons, whether natural or legal persons, are not in one of the exclusions situations described above.

Thus, similarly to Directive 2015/849 also the EU Financial Regulations and Regulations 966/2012 and 1068/2012 and Directive 2014/24 create an obligation to identify and verify persons with control without – in their context an obligation for public authorities providing public contracts or public funds – but fail to provide a definition of what does the term "person with control" of the tenderer or public contract recipient actually means. Yet, the term control is defined in recital 31 and Article 22 of Directive 2013/34.⁴⁵ From the wording and use of the term control in Directive 2013/34 it is clear that it includes legal persons with direct and indirect control, i.e. all legal persons within the corporate and control structure of the tenderer or beneficiary.

Both the obliged entities under Regulation 2015/849 and the providers of public contracts and subsidies are obliged, in addition to the previously described duties, to observe the requirements of Regulation 2001/2580 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism in conjunction with specific Regulations imposing economic sanctions.⁴⁶ Both Regulation 2001/2580 as well as the specific ones order freezing of all funds, other financial assets and economic resources belonging to, or owned or held by, a natural or legal person, group or entity included on the sanctions lists, prohibit making available of funds, other financial assets and economic resources, directly or indirectly, to, or for the benefit of those persons or entities, as well as providing financial services to them.⁴⁷

Unlike other above-mentioned instruments of EU law, the General Sanctions Regulation gives a hint on what ownership and control of another person or entity should mean. The Regulation stipulates, with respect to ownership, when assessing whether a company is owned by another person or entity, the criterion to be taken into account is the possession of more than 50% of the proprietary rights or having majority interest in a company as well as it defines criteria for establishing whether a person has a control over another legal person.⁴⁸

⁴⁵ OJ L 182, 29.6.2013, 19-76.

⁴⁶ The Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article 1 (4), (5) and (6) of Common Position 2001/931/CFSP; such list shall consist of: (i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism; (ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism; (iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in points (i) and (ii); or (iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in points (i) and (ii) (Art. 2 (3) Regulation 2001/2580).

⁴⁷ Art. 2 (1) (a) Regulation 2001/2580.

⁴⁸ With respect to control it states that 'controlling a legal person, group or entity' means any of the following: (a) having the right to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person, group or entity; (b) having appointed solely as a result of the exercise of one's voting rights a majority of the members of the administrative, management or supervisory bodies of a legal person, group or entity who have held office during the present and previous financial year; (c) controlling alone, pursuant to an agreement with other shareholders in or members of a legal person, group or entity, a majority of shareholders' or members' voting rights in that legal person, group or entity; (d) having the right to exercise a dominant influence over a legal person, group or entity, pursuant to an agreement entered into with that legal

The notion of control comprises the ability to take relevant decisions within the legal person and impose those decisions; control can be acquired by several means, for example, by owning a controlling block of shares. Control can be established by using threshold approach or majority interest approach. The threshold approach is based on minimum percentage of ownership interest in the legal person⁴⁹. This approach is contained in the 2580/2001 Regulation and the corresponding Guidelines which consider a controlling person to be the person holding in a legal person an ownership interest of 50 % + 1 share. Under the majority interest approach control is not determined on the basis of ownership percentage but on the basis of effective control exercised through any contract, understanding, relationship, intermediary or tiered entity. To determine the owner having control at each level of shareholding interest, both approaches have to be combined to capture situations where the interest of the majority owner does not exceed 50 %, but is still the highest one and ensures control to the majority owner.

In practice, this obligation entails for relevant subjects of private law as well as for public law organisations to check whether among the persons with ownership or control over the client or public funds or subsidies recipient there is no natural or legal person, including a state or state-like organisations, listed on the sanctions list⁵⁰ which are usually attached as annexes to the Regulations imposing sanctions on specific states or organisations⁵¹.

0.2.4. Evidentiary value of information on corporate ownership

If, an investigator, be it an EU auditor or national prosecutor, need to find out information and evidence of a given ownership structure, for example when checking whether and a declared SME is indeed an SME and not a hidden subsidiary of a large company, or to prove that someone is a beneficial owner of certain company, that is to find information and evidence of ownership structure between the company and the beneficial owner, such investigator needs to know what is an ownership structure in general and how to identify and prove it in the concrete case. If such a person does not know the first, he or she can hardly do well the second; if someone does not know what to look for, it is highly improbable that he would find what he is looking for.

Although investigators have the possibility to use certain systems which perform an automatic search in business registers in order to find those ownership structures such disclosures are mere indications with a low reliability of researched information. This is not necessarily due to the deficiencies of these research systems, but rather due to the lack of legal or practical reliability of information and documents contained in the national registers from where these systems retrieve information. For example, the ARACHNE system used by the European Commission gathers information on ownership structures from the ORBIS database and World Compliance database which gather such information about ownership structures and

person, group or entity, or to a provision in its Memorandum or Articles of Association, where the law governing that legal person, group or entity permits its being subject to such agreement or provision; (e) having the power to exercise the right to exercise a dominant influence referred to in point (d), without being the holder of that right; (f) having the right to use all or part of the assets of a legal person, group or entity; (g) managing the business of a legal person, group or entity on a unified basis, while publishing consolidated accounts; (h) sharing jointly and severally the financial liabilities of a legal person, group or entity, or guaranteeing them (Art. 1 (5) and (6) Regulation 2001/2580).

⁴⁹ FATF Guidance on transparency and beneficial ownership, pt. 33 (a), 15.

⁵⁰ Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Dated 8 December 2003 (15579/0), as amended by doc. 9068/13 dated 30 April 2013 in relation to the notion of ownership and control (subheading "Compliance", p. I to V after para 55).

⁵¹ European External Action Service, Consolidated list of EU financial sanctions and Consolidated list of persons, groups and entities subject to EU financial sanctions, 18 August 2015, available at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/8442/Consolidated%20list%20of%20sanctions

beneficial owners from the national company registries⁵². However, a company registry may or may not contain information on ownership structures and/or beneficial owners; also such information in the company registry may or may not be up-to-date as well as it may or may not be legally binding. Hence, any information on ownership structures and/or beneficial owner(s) simply collected by an automatic research engine from company register will – without an appropriate legal assessment of such information – necessarily be incomplete and lacking legal reliability.

The investigator can find himself in several different situations. He can be faced with the name and possibly identification number of the legal person whose ownership he has to disclose without any preliminary information obtained beforehand; in such a case he has to do himself the investigation of individual direct and indirect owners of the legal persons in company registries. Or the investigator thanks to the access to some of the aforementioned systems from which he can obtain some preliminary information on ownership structure which he would nevertheless have to verify, since as argued above, this information does not have to be legally relevant or up-to-date. Alternatively, the investigator can benefit from the information and evidence of the ownership structure of the legal person in question verified as compliant with the abovementioned Practice Guide which develops the existing EU rules and FATF Recommendations, that is legally relevant information which is evidenced and updated.

In all of the three situations, the investigator will have to do an investigation on his own account. The investigator cannot rely only on the revealed structure even if evidenced, for a simple reason: the registering person can always lie or provide false evidence. Even the best registering system is not able to capture all fake behaviour: for example, it will always be necessary for an investigator to check the circumstances of controlling ownership in situations where there is a possibility of existence of a reverse shareholder agreement or the possibility that the declared beneficial owner is in reality only acting beneficial owner representing the true final beneficial owner. The three described situations will only differ in terms of costs and effectiveness of the investigator's activity. The costs will be the highest in the first situation and the lowest in the last one whereas with the effectiveness it would be vice-versa.

0.2.5. Dealing with multiplicity of evidencing documents

Unlike with respect to documents evidencing the existence and basic identification information about a corporate subject where there normally will only a single document – a statement from the relevant public registry, with respect to documents evidencing the interest and its owner more than one evidencing document may exist. Should multiple evidencing documents about an interest in a corporate subject or its owner exist, an assessment as to their legal force (binding character) should be performed: as a result, only the document with the highest legal force should be the relevant legally binding evidencing document

The issues with proper evidencing of ownership interest can be illustrated on the example of the Czech Republic: whereas in respect of limited liability companies it is always possible to evidence their shareholders and their ownership interest by a record from the commercial registry, for joint-stock companies this is possible only if such company has a single direct shareholder; should the joint-stock company have more than one direct shareholder those

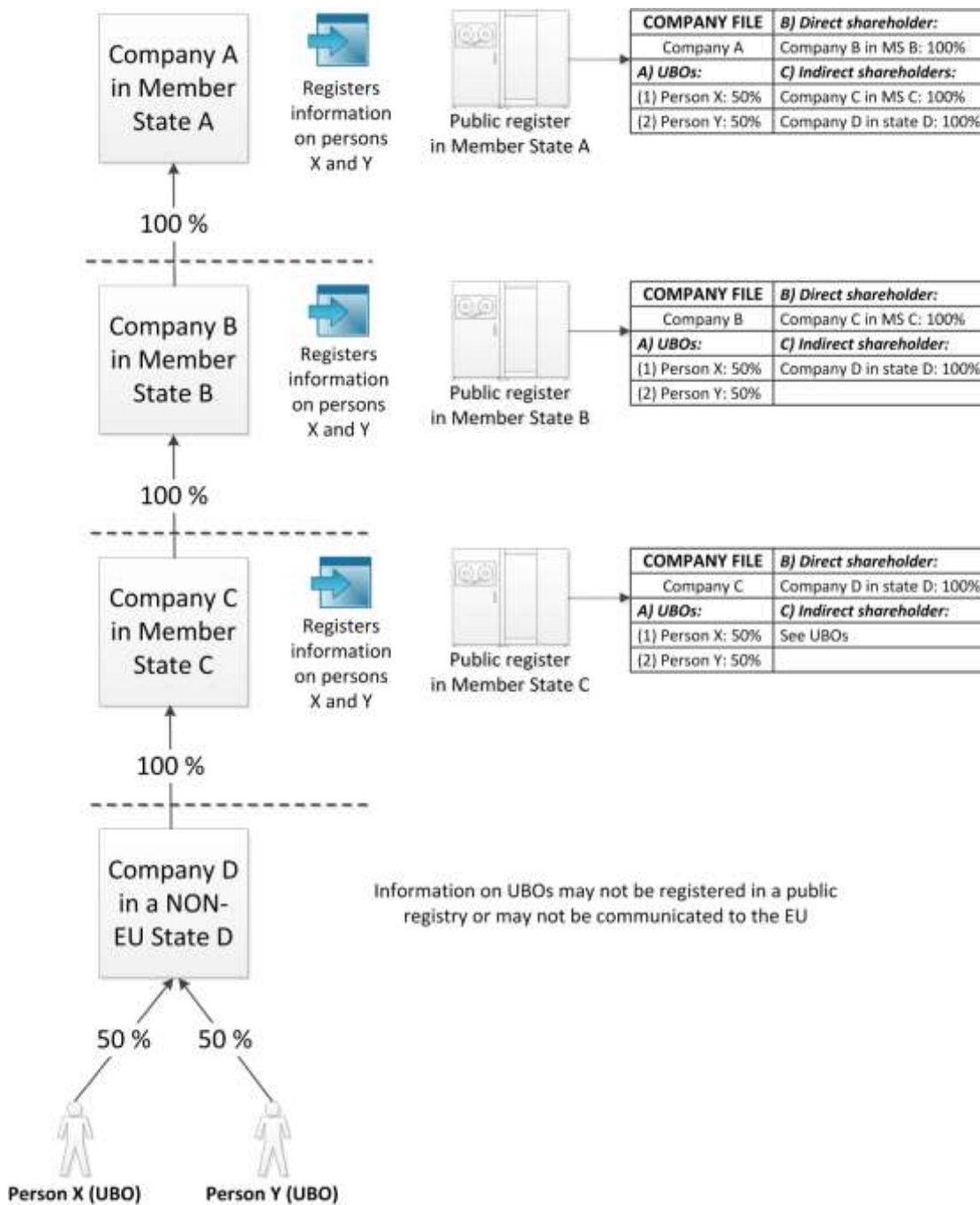
⁵² L. Molemans, "ARACHNE Risk scoring tool: fraud risk assessment and management for ESI Funds 2014-2020" 3. 12. 2016. [cit. 6. 1. 2017]., Arachne: Risk scoring tool. Prague. 2016. [online presentation]. [cit. 6.1. 2017]. Available at: <http://www.dotaceeu.cz/getmedia/daf72457-2e2a-47cf-8bff-12e4040e5c41/Arachne-training-Prague-201610.pptx>

shareholders, their names and the amount of their shareholding interests will not appear on the record from the companies registry. Also, with respect to the limited liability companies, if they have not issued shareholding certificates, the record from the registry is the constitutive document evidencing the shareholding interest and their owner; by contrast, if the limited liability company has issued shareholding certificates, the constitutive document is not the record from the commercial registry, but the shareholder list or the shareholding certificate as such. Similarly, in case of the joint-stock company having a single shareholder the record from the commercial registry containing the name of the shareholder is not a constitutive evidencing document, this is represented by the list of shareholders and the share certificate – if the joint-stock company issued paper shares – or the list of shareholders kept by the custodian or the record of the shareholder account – if the joint-stock company issued dematerialised shares.

The diversity of outcomes in this respect will be found in all other Member States: for example, in the Netherlands the amount of ownership interest and its direct owner(s) will appear on the record from the corporate registry if the Dutch limited liability company or joint-stock company will have single shareholder, not in a situation where the limited liability company or joint-stock company will have more than one shareholder; by contrast, in Cyprus the amount of ownership interest and its direct owner(s) will be contained on the record from the corporate registry irrespective of the number of direct owners of such interest.

A similar problem with multiplicity of potential differing information negatively affecting is effectiveness will exist also with respect to the information on beneficial ownership. This effectiveness problem can be summed up on the following illustration using the above-mentioned hypothetical structure of ownership chain of four companies, three of which are located in Member States, and the last one in non-EU Member State D owned by beneficial owners Person X and Y. Supposing that the public registry of Member State B and public registry of non-EU State D do not keep information about direct shareholders of companies, it would not be possible to prove for company A in Member State A to the authority keeping the public register in this Member State that its parent company B in Member State B is owned by Company C in Member State C (public register in Member State B does not keep information about direct shareholders of companies registered there) and that Company D in State D is owned by beneficial owners persons X and Y (public register in non-EU State (tax haven) D does not keep information about direct shareholders of companies registered there).

Picture 10



Upon a change of a beneficial owner, for example, upon a sale of shares in company in Member State D by Person X to Person Z, three applications to register this change would have to be made in Member States A, B and C by the respective companies. The longer the ownership interest chain would be within Member States, the higher the number of parallel applications would have to be.

If these three applications containing the identical information about the beneficial owners are not made at the same time, the information about the beneficial owners in public registries in Member States A, B and C will differ due this time lag. As far as the illustrative example is concerned, if moreover, there is an error in typing of the name of Person Z in any of the three

applications made by companies in Member States A, B or C there will be differing information about the same person in company registries in those Member States: in such a case the authorities of Member States A, B and C keeping the company registries would have to agree which of the three applications is correct and which should be rectified; should the authorities keeping the three registries in different Member States fail to agree, some supranational authority would most probably be obliged to intervene and make a definitive decision which authorities of Member States A, B and C would then respect. If no such procedure reconciling the possibly differing information about beneficial owners in their registries is instituted, once these registers will be fully opened to the public, as it is proposed⁵³, the inconsistencies will become public as well.

The same situation entailing parallel multiple applications and possible reconciliation of data in the public registries would also arise in case of a change of any company in the ownership interest chain: for instance, if company in non-Member State D sells its ownership interest in company in Member State C, three parallel applications registering this change will have to be done in registries in Member State A, B and C. The same problems issues will arise in a purely national context with a decentralised management of company registry since all legal persons in the ownership structures will have to register any change of beneficial owner or a legal person in the ownership structure with different regional authorities managing the register of beneficial owners.

Unfortunately, neither the joining of company registers⁵⁴ nor the envisaged interconnection of registers of beneficial owners will provide for a remedy to the problem of effectiveness of disclosure of ownership structures and beneficial owners. Paradoxically, as it is shown the next subsection, unless the interconnection of registers of beneficial owners is preceded by a common EU-wide guidance on the way in which beneficial ownership interest should be identified and evidenced, the envisaged interconnection will make the problem of a lack of effectiveness in verification of disclosed ownership structures and beneficial owners apparent at the same time it will create a potentially significant and often unnecessary administrative burden in particular for legal persons with more complex or cross-border ownership structures.

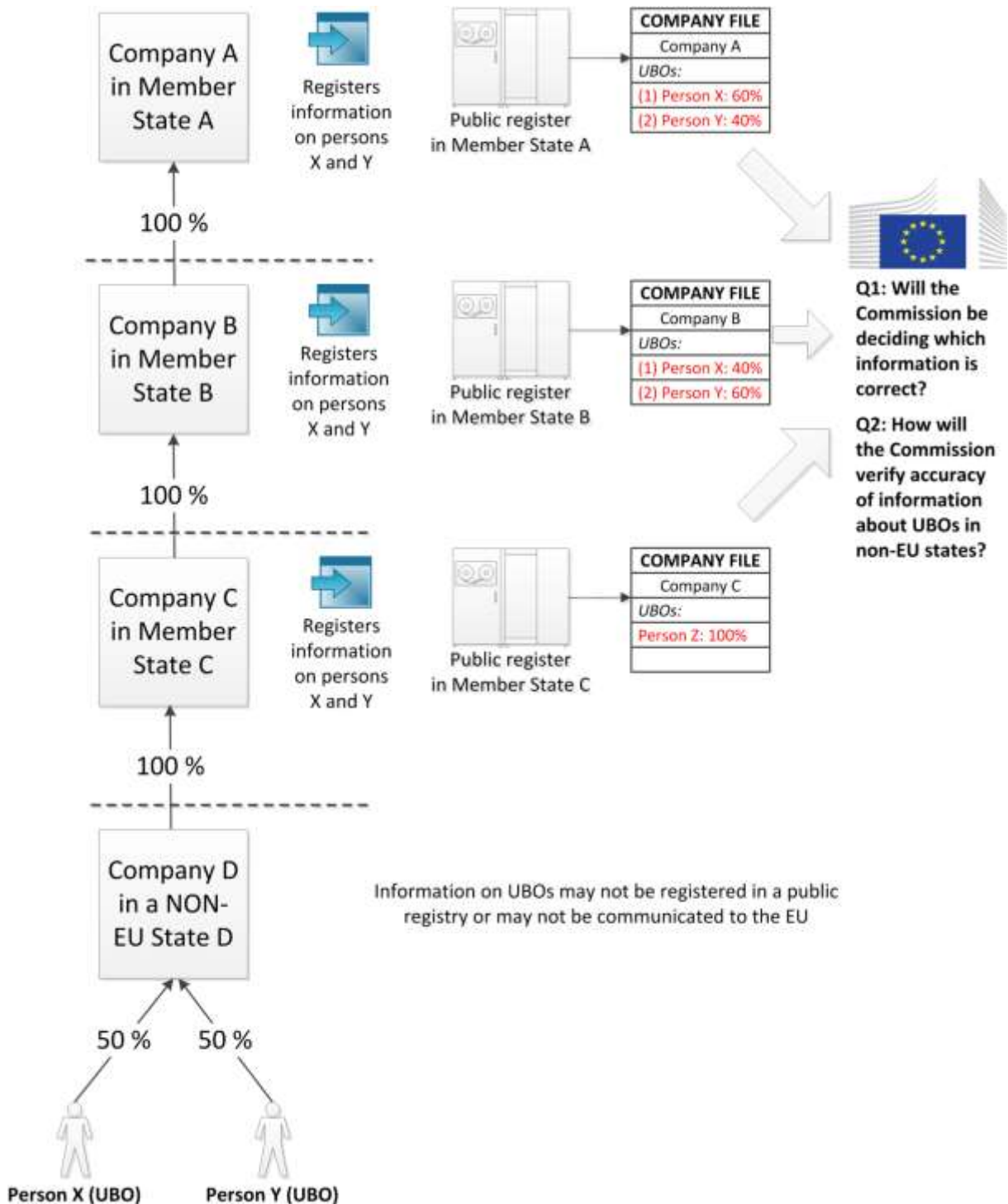
Without further practical streamlining the new rules on ultimate beneficial owners disclosure under the new Anti-Money Laundering Directive will create a high administrative burden with low efficiency. A company with subsidiaries in all 28 Member States whose UBO(s) would change would have to file the same information about the change in 28 different public registers. Since in respect of the public registry in each of the Member States it is usually the director of the subsidiary registered in that Member State who is entitled to act vis-à-vis the public registry, 28 directors would have to sign the application to file the change of the same UBO(s) in each of the registers. Thus, the creation of a public registry of corporate ownership structures, including ultimate beneficial owners, in each of 28 Member States, would include an enormous an unnecessary administrative burden for companies. Also for authorities of Member States keeping registers of companies including ownership structures up to the ultimate beneficial owner(s) would mean an enormous increase of administrative burden. If the filed information about the ownership structures up to the ultimate beneficial owner(s) which will be mostly duplicit should have any value, i.e. be consistent and not differ between

⁵³ Proposal for a Directive amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (COM(2016)0450 final).

⁵⁴ Directive 2012/17 as regards the interconnection of central, commercial and companies registers, OJ L 156, 16.6.2012, 1–9.

the registries of different Member States, upon each filing of the change in the ownership structure of a company extending to more than one Member State a process of „reconciliation“ between the authorities keeping the registry of Member States concerned would have to be started to make sure that the company in question filed the same information in all the relevant Member States.

Picture 11

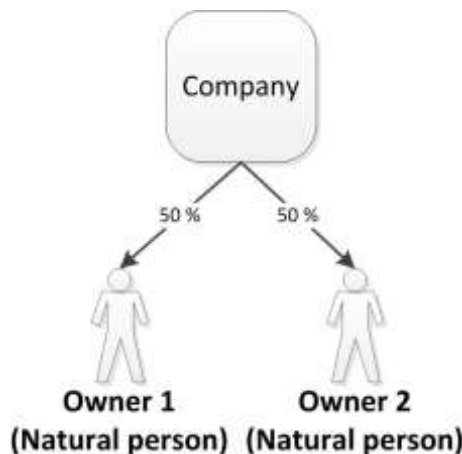


1. Information and evidence of direct and beneficial corporate ownership in selected EU and non-EU Member States

The ownership structure is composed of two elements: legal persons and other arrangements on the one hand – grouped under a common term corporate subjects – and ownership interest on the other hand. Corporate subjects in the ownership structure can be either business corporations, such as limited liability companies, non-profit legal persons, such as associations or foundations, or trust-like or fund-like structures, such as trusts or funds. An ownership structure is either simple or complex.

A simple ownership structure involves one ownership layer and corresponds to the situation of direct ownership⁵⁵ whereas a complex ownership structure includes more than one ownership layer and corresponds to the situation of indirect ownership interest⁵⁶. The simple ownership structure refers to a situation when a legal person is directly owned by the beneficial owner, that is by one or more natural persons or ultimate public organisations. For example, in Company A, natural Persons X and Y can have each an ownership interest of 50% provided that they act on their own and not on behalf of any other persons on the basis of a power of attorney or other contract of representation. In such a case direct owners of company A correspond to legal owners which, in turn, correspond to beneficial owners.⁵⁷

Picture 12 – Single ownership structure



The ownership structure of a legal person, in particular companies, can nevertheless be much more complex: it can have several levels of owners – legal or natural persons – up to the ultimate beneficial owners. Such a chain of owners and ownership interests represents a case of indirect ownership: in a situation of indirect ownership there is at least one other subject, legal person or other arrangements, between the legal person in question and the beneficial owner. For instance, a company registered in Member State A is wholly owned by a company registered in Member State B which is, in turn, fully owned by a company registered in

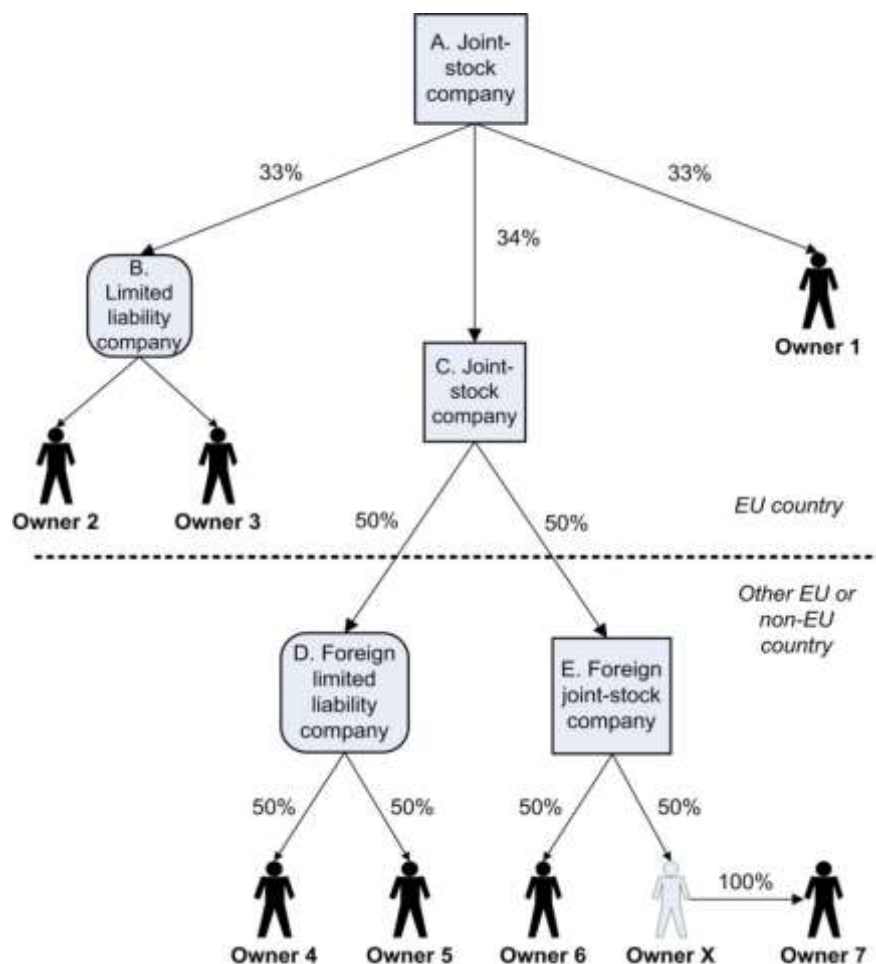
⁵⁵ Art. 3 (6) (a) (i), second sentence Directive 2015/849.

⁵⁶ Art. 3 (6) (a) (i), third sentence Directive 2015/849.

⁵⁷ The beneficial ownership interest, in such a case corresponds to a direct ownership interest: as stipulated in the definition of the beneficial owner in the Directive 2015/849 a shareholding of 25% plus one share or an ownership interest of more than 25% in the customer held by a natural person shall be an indication of direct ownership.

Member State C which has a 100% shareholder a company registered in a non-EU Member States D which, in turn, has two 50% beneficial owners – natural persons (Persons X and Y). The determination of controlling owners in a corporate entity on the basis of its ownership interest expressed in percent is relatively easy where there is one controlling owner only, for example, in a situation where there are two owners, one with an interest of 60 %, the other with the interest of 40 %: in such a situation the controlling owner is the owner with 60 % and, it should be only his ownership structure (direct owners), who in turn should be examined. The determination of controlling owners is more difficult in case of plurality of controlling owners since in such a case in order to determine the controlling owner or owners, a number of additional more detailed technical issues have to be dealt with: for instance, how to identify owners acting in concert⁵⁸, whether collateral takers on who favor an interest was pledged are not controlling owners, whether shareholder agreements or reverse controlling agreement were not entered into etc. These evaluations must be made at any level of shareholders (owners) up to the level of beneficial owners.

Picture 13 - More complex corporate ownership structure



⁵⁸ Moreover, in another example, as the definition of indirect ownership suggests there can be more than one controlling owner with 25% + 1 share interest, for example, if two 30 % interest owners act jointly and they can outvote the third owner with the highest nominally 40 % interest. In a way that the combined interest of the latter would trump the 40 % shareholder.

A beneficial owner may be either a natural person or a representative of an ultimate corporate subject or an ultimate public organisation. The ultimate corporate subject is an entity which does not have shareholders owning more than 25 % interest and where no controlling beneficial owners exist: in such a case, instead of beneficial owners, the top directors have to be identified and evidenced. The ultimate public organisation is a public law entity, such as an international organisation, state, regional, municipal, local organisation or other self-regulatory body, in which no other legal entity or arrangement has a interest or other relevant interest. The ultimate public organisation may be an international organisation, state, territorial administrative unit, professional chamber, e.g. bar association, or autonomous public institution, e.g. university.

1.1. EU Member States

1.1.1. Czech Republic

A. Information about composition of corporate ownership structures (beneficial ownership interest)

In the Czech Republic, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure)

- joint-stock company: **akciová společnost (a.s.)**,
- European company: **evropská společnost (SE)**,
- limited liability company: **společnost s ručením omezeným (s r.o.)**,
- limited partnership: **komanditní společnost (k.s.)**,
- general partnership: **veřejná obchodní společnost (v.o.s.)**,
- cooperative: **družstvo**,
- European cooperative company: **evropská družstevní společnost**,
- State enterprise: **státní podnik**⁵⁹.

Moreover, the following corporations with partial legal personality - which in most cases will have a role of owned and controlled entities within complex corporate structures - exist under Czech law.

- registered branch: **odštěpný závod**,
- non-registered branch: **pobočka**.

Moreover, the Czech National Bank keeps registers of certain investment funds, namely those which have a fund-like structure⁶⁰. By contrast, investment funds which have corporate structure are registered in the commercial register similarly to other corporations⁶¹.

In addition, theoretically – and in practice rarely – the following types of non-profit legal persons can be part of corporate ownership structures, both as owned and controlled subjects and owning and controlling subjects within those structures:

- association: **spolek**, including the union of association: **spolkový svaz**,
- association of general interest: **obecně prospěšná společnost**,

⁵⁹ Národní podnik

⁶⁰ Podílové fondy.

⁶¹ Akciová společnost s proměnným základním kapitálem, komanditní společnost na investiční listy a další právnické osoby, jež mohou působit jako fondy kvalifikovaných investorů:

- institute: **ústav**,
- foundation: **nadace**, endowment fund: **nadační fond**,
- branch of an association: **pobočný spolek**.

Finally, special types of non-profit entities exist under Czech law; however, these entities due to their special character will almost never be part of complex corporate ownership structures⁶².

The ownership interest in Czech legal persons can take different forms which have an effect on the accessibility and credibility of information and evidence of the amount of this interest: within the category of Czech corporations listed above one can differentiate between, on the one hand, joint-stock companies and European companies in which the interest is evidenced by the ownership of shares, and on the other hand, other than joint-stock companies, including European company, in which the interest takes a form of participation interest; within joint-stock companies, including European companies, the evidencing of ownership of shares differs depending on the type of shares (registered / bearer) and form of shares (paper / book-entry (electronically evidenced)). A particular kind of corporations is a cooperative in which members have membership interest and the European cooperative company (SCE) with a special treatment. Also within the category of non-profit legal persons, associations in which members have a membership interest differ from asset-based non-profit legal persons, including institute (ústav), foundation (nadace), endowment fund (nadační fond), and also association of general interest (obecně prospěšná společnost). Evidence about ownership interest in Czech legal persons can be found on the statements from public register(s), certain non-public register(s) and documents issued by the legal person itself.

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

In the Czech Republic, there are five key public registers of legal persons, of which the most important is the commercial register which records data and keeps documents about corporations; the other four registers include associations register, foundations register, register of institutes and register of housing communities. These five registers are accessible via a single point of access through the website www.justice.cz. The access includes access to data and allows for downloading of corporate documents which are registered in the collection of documents (Sbírka listin) which is a part of the commercial register as well as other public registers; both the access to data and downloadable documents is free of charge

⁶² European Economic Interest Grouping (Evropské hospodářské zájmové sdružení), interest association of legal persons (zájmová sdružení právnických osob), commodity stock-exchange (komoditní burza) ecclesiastic entities and their groupings (církve či náboženská společnost, evidovaná církevní právnická osoba, svaz církví a náboženských společností), labour unions, their branches and associations (odborové organizace a jejich pobočky), union of employers, their branches and associations (organizace zaměstnavatelů a jejich pobočky), chamber of commerce and chamber of agriculture, including their regional branches with legal personality (Hospodářská komora ČR a Agrární komora ČR, včetně jejich regionálních komor), game chasing community (hřebčí společenstvo), housing cooperative (bytové družstvo), housing community (společenství vlastníků jednotek), social charity (sociální družstvo), alliance of municipalities (svazek obcí), regional council of cohesion region (Regionální rada regionu soudržnosti), European grouping of territorial cooperation (evropské seskupení pro územní spolupráci), school entity (školská právnická osoba), political party and institute (politická strana či politické hnutí).

and does not require any registration of the person who wants to access such data and documents.

The statements of the commercial register of the following types of corporations contain legally binding information about the direct owners (shareholder(s)/founder(s)) of those individual types of corporations:

- general partnership: shareholder(s),
- limited partnership: shareholder – limited partner and general partner,
- limited liability company which did not issue participation certificates: shareholder(s) – owner(s) of the participation certificate,
- state enterprise.

By contrast, the statements of the commercial register of the following types of corporations contain only declaratory (not legally binding) information about the owners (shareholder(s)/founder(s)) of those corporations:

- limited liability company which did not issue participation certificates: shareholder(s) – owner(s) of the participation certificate,
- joint-stock company with one shareholder,
- European company with one shareholder.

The statements of the other public registers of the following types of non-profit legal persons contain information about the owners (members/founders) of those individual types of non-profit legal persons:

- general interest association (founder),
- institution (founder),
- foundation (founder),
- endowment fund (zakladatel),
- branch of an association (the main association).

With respect to the following legal persons the statement of the public register does not provide any information about the amount of interest or the owner of interest:

- joint-stock company with more than one shareholder,
- cooperative, including social and housing cooperative,
- association.

Finally, the Czech National Bank keeps registers of certain investment funds, namely those which have a fund-like structure⁶³. By contrast, investment funds which have corporate structure are registered in the commercial register similarly to other corporations⁶⁴.

b. Non-public registers

If a Czech joint-stock company or European company with the seat in the Czech Republic has book-entry, including immobilised shares, this fact as well as details about those shares can be found in a statement from commercial register or from its articles of associations which are directly downloadable therefrom. From the articles of associations, it is also necessary to find out whether the list of shareholders of book-entry shares is maintained by the depositary or the company itself: in the first case the identity of owners of book-entry shares and evidencing documents have to be asked from such depositary only, in the second case it is in addition necessary to check whether the information from the depositary correspond to the information about shareholders (owners of shares) in the list of shareholders kept by company itself.

Legally, as of 1 May 2004, practically, as of 7 July 2010 the Czech Central Depositary⁶⁵ registering book-entry (dematerialised/electronically evidenced as well as immobilised) securities, including shares came to existence⁶⁶. The Central Depositary registers certain types of book-entry shares on its own, but most of it via the accounts of its participants – mostly banks – which keep securities accounts for issuers of shares and owners of shares. Outside the described direct and indirect registers of securities accounts of the Central Depositary, also autonomous registers of securities account can be maintained by banks and certain financial intermediaries; also the Czech National Bank maintains a register of its own. However, book-entry shares kept on the accounts maintained by Czech regulated subjects cannot exist outside the aforementioned central depositary, depositaries linked to the central depositary, the autonomous depositaries and the Czech National Bank depositary. Therefore, evidence of owners of shares registered in these depositaries need to be asked from the persons maintaining these securities accounts, involving registration of book-entry shares of joint-stock companies and European companies.

Certain public authorities⁶⁷ have the right to ask the Central Depositary and the persons maintaining the autonomous registers of securities account information and evidencing documents about the owners of book-entry shares registered on securities accounts which they keep.

Except for joint-stock companies with book-entry shares where the register of shareholders or securities account documenting shareholders are kept by the central depositary or its member, Czech legal persons are obliged – with certain exception regarding associations - continuously evidence their shareholders or members in the list of shareholders or members, sometimes also called register of shareholders or member. This list or register should usually be stored at the place of the registered seat of the legal person. Such list or register should contain information on interest and its owners (shareholders / members) which allow for identification

⁶³ Podílové fondy.

⁶⁴ Akciová společnost s proměnným základním kapitálem, komanditní společnost na investiční listy, další právnické osoby, jež mohou působit jako fondy kvalifikovaných investorů:

⁶⁵ CDCP, a.s.

⁶⁶ The Central Depositary took over the registers of securities from the former Securities Centre (*Středisko cenných papírů*).

⁶⁷ These authorities include: courts, bailiffs, criminal law enforcement bodies, tax authorities, insolvency administrators, Czech National Bank, Ministry of Finance, the Czech Intelligence Service.

of the amount and the nature of the interest as well as its owners and, possibly, include all preceding shareholders or members in continuous timeline record without any gaps, although this may always not be the case.

C. Registers of beneficial owners and trusts

i. Beneficial ownership register

The register of beneficial owners will be established as of 1 January 2018 by the Act no. 460/2016 Sb. The register will not open to the general public, not even for natural or legal persons who can have a legitimate interest as it is required by the Fourth Antimoney Laundering Directive. The access is provided to selected public authorities only⁶⁸. Every Czech legal person has an obligation to file in this register the information about its beneficial owner(s) – natural persons(s) and a description of the beneficial ownership interest (corporate ownership structure) at the latest by the end of 2018. Neither the aforementioned Act nor the guidance document provide any information about how to identify and evidence the beneficial ownership interest (corporate ownership structure), in particular in a situation of indirect ownership.

ii. Trusts and trust registers

Trust (**svěřenský fond**) under Czech law is an aggregation of separated assets without owner. Czech trust is not a legal person, it is only a legal construction, involving always the founder/the settlor, the trustee and one or more beneficiaries; it can also have a council of protectors supervising the trustee. The controlling relations within the Czech trust are defined in the founding deed which can, but does not have to include the identity of the beneficiary(ies); if it does not include them, the beneficiary(ies) have to be identified in a document issued by the trustee⁶⁹. If the trust owns an asset which is registered in a public register, for example, a corporation, it is the trustee who is indicated in such a register as the owner with a specification of his trustee role.

Trusts created in the Czech Republic between 1 January 2014 and before the end of 2017 were not registered in any public register. Those created as of 1 January 2018 will have to be registered in the newly established register of trust to which also the previously established unregistered trust will have to register themselves in the course of 2018. Foreign trusts active at the territory of the Czech Republic will have to be registered in the register of foreign trusts annexed to the trust register. The register will contain data on the founder/settlor, trustee, beneficiaries, including the beneficial owner(s) of the trusts – which is any person from the aforementioned who has the de facto control over the trust. The access to the register of trusts and foreign trusts is restricted to public authorities⁷⁰.

⁶⁸ These authorities include: courts, bailiffs, criminal law enforcement bodies, tax authorities, insolvency administrators, Czech National Bank, Ministry of Finance, the Czech Intelligence Service etc.

⁶⁹ § 1448 (1) of the Civil Code.

⁷⁰ Access is provided to the following public authorities: (i) soudu pro účely soudního řízení, (ii) orgánům činným v trestním řízení pro účely trestního řízení a státnímu zastupitelství též pro účely výkonu jiné než trestní působnosti, (iii) správci daně, poplatku nebo jiného obdobného peněžitého plnění pro účely výkonu jejich správy, (iv) zpravodajské službě pro účely plnění úkolů podle zákona, který upravuje činnost zpravodajských služeb, (iv) Finančnímu analytickému úřadu, České národní bance a dalším orgánům při výkonu činností podle zákona o některých opatřeních proti legalizaci výnosů z trestné činnosti a financování terorismu nebo zákona o provádění mezinárodních sankcí za účelem udržování mezinárodního míru a bezpečnosti, ochrany základních lidských práv a boje proti terorismu, (v) České národní bance při výkonu dohledu nad osobami působícími na

iii. Beneficial owners – ultimate public organisations and other organisations

Apart from the state (the Czech Republic) who can own and owns shareholding interest in corporations via the relevant competent ministries which – administer – such interest on behalf of the state, also regions⁷¹ and local municipalities⁷² can own shareholding interests in corporations. The same shareholding interests can belong also to professional self-governing organisations⁷³, autonomous public law organisations⁷⁴ and state funds⁷⁵.

finančním trhu a při výkonu činností podle zákona o ozdravných postupech a řešení krize na finančním trhu, (vi) Národnímu bezpečnostnímu úřadu, Ministerstvu vnitra nebo zpravodajské službě pro účely bezpečnostního řízení podle zákona, který upravuje ochranu utajovaných informací a bezpečnostní způsobilost, (vii) Nejvyššímu kontrolnímu úřadu pro účely výkonu jeho působnosti, (viii) povinné osobě podle zákona o některých opatřeních proti legalizaci výnosů z trestné činnosti a financování terorismu v souvislosti s prováděním identifikace a kontroly klienta, a (ix) tomu, o němž tak stanoví jiný zákon.

⁷¹ There are 14 regions: Jihočeský kraj, Jihomoravský kraj, Karlovarský kraj, Královéhradecký kraj, Kraj Vysočina, Liberecký kraj, Moravskoslezský kraj, Olomoucký kraj, Pardubický kraj, Plzeňský kraj, Středočeský kraj, Ústecký kraj, Zlínský kraj.

⁷² The list of municipalities can be found at the website of the Czech statistical office https://www.czso.cz/csu/xj/abecedni_seznam_obci

⁷³ Professional self-governing organisations are: Česká komora architektů, Česká komora autorizovaných inženýrů a techniků činných ve výstavbě, Česká lékárnická komora, Česká lékařská komora, Česká stomatologická komora, Exekutorská komora České republiky, Komora patentových zástupců České republiky, Komora veterinárních lékařů České republiky, Komora daňových poradců České republiky.

⁷⁴ Autonomous public law organisations are • Česká národní banka, Česká televize, Česká tisková kancelář, Český rozhlas, Nejvyšší kontrolní úřad, Všeobecná zdravotní pojišťovna České republiky, státní organizace Správa železniční dopravní cesty; dále spadají pod autonomní samosprávné subjekty veřejné výzkumné instituce (v.v.i) a veřejné vysoké školy (<http://www.msmt.cz/vzdelavani/vysoke-skolstvi/prehled-vysokych-skol-v-cr-3>)

⁷⁵ State funds are: Fond pojištění vkladů, Garanční fond obchodníků s cennými papíry, Pozemkový fond ČR, Státní fond dopravní infrastruktury, Státní fond kultury ČR, Státní fond pro podporu a rozvoj kinematografie, Státní fond rozvoje bydlení, Státní zemědělský intervenční fond, Vinařský fond, Zajišťovací fond.

1.1.2. Slovakia

A. Information about composition of corporate ownership structure (beneficial ownership interest)

In Slovakia, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure):

- joint-stock company: **akciová spoločnosť (a.s.)**, including joint-stock company with variable share capital: **akciová spoločnosť s premenlivým základným imanom** and simplified joint-stock company: **jednoduchá spoločnosť na akcie (j.s.a.)**
- European company: **Európska spoločnosť (SE)**
- limited liability company: **spoločnosť s ručením obmedzeným (s r. o.)**,
- limited partnership: **komanditná spoločnosť (k.s.)**,
- general partnership: **verejná obchodná spoločnosť (v.o.s.)**,
- cooperative: **družstvo**,
- European cooperative company: **Európske družstvo**,
- State enterprise: **štátny podnik (š. p.)**

Moreover, the following corporations with partial legal personality - which in most cases will have a role of owned and controlled entities within complex corporate structures - exist under Slovak law.

- registered branch: **organizačná zložka**,
- registered branch of a foreign legal person: **organizačná zložka zahraničnej osoby**.

In addition, theoretically – and in practice rarely – the following types of non-profit legal persons can be part of corporate ownership structures, both as owned and controlled subjects and owning and controlling subjects within those structures:

- association (**občianske združenie**),
- association of general interest (**nezisková organizácia poskytujúci všeobecne prospešné služby**),
- foundation (**nadácia**), and
- certain other specific types of non-profit legal persons.

The ownership interest in Slovak legal persons can take different forms which have an effect on the accessibility and credibility of information and evidence of the amount of this interest:

within the category of Slovak corporations listed above one can differentiate between, on the one hand, joint-stock companies and European companies in which the interest is evidenced by the ownership of shares, and on the other hand, other than joint-stock companies, including European company, in which the interest takes a form of participation interest; within joint-stock companies, including European companies, the evidencing of ownership of shares differs depending on the type of shares (registered / bearer) and form of shares (paper / book-entry (electronically evidenced)). A particular kind of corporation is a cooperative in which members have membership interest and the European cooperative company (SCE) with a special treatment.

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

In Slovakia, the main public register of legal persons is the commercial register (Obchodný register) which records data and keeps documents about corporations accessible via www.orst.sk. The access includes access to data included in the records of Slovak corporations registered therein. Corporate documents are registered in the collection of documents (Zbierka listín) which is a part of the Slovak commercial register; however, only lists indicating the title of corporate documents registered in the collection of documents are provided, the registered documents themselves are not directly downloadable from the collection of documents. Access to the data registered in the Slovak commercial register is free of charge; the access to the corporate documents filed in the collection of documents is paid and is accessible only through the regional courts⁷⁶ which maintain the commercial register, including the collection, and in the territory of which the corporation in question has its registered seat.

The statements of the commercial registrar of the following types of corporations contain information about the direct owners (shareholder(s)/founder(s)) of those individual types of corporations:

- general partnership: shareholder(s),
- limited partnership: shareholder – limited partner and general partner,
- limited liability company: shareholder(s) – owner(s) of the participation certificate,
- state enterprise.

By contrast, the statements of the commercial register of the following types of corporations contain only declaratory (not legally binding) information about the owners (shareholder(s)/founder(s)) of those corporations:

- joint-stock company, including simplified joint-stock company, with one shareholder,
- European company with one shareholder.

⁷⁶ These courts are: Okresný súd Banská Bystrica, Okresný súd Bratislava I., Okresný súd Košice I., Okresný súd Nitra, Okresný súd Prešov, Okresný súd Trenčín, Okresný súd Trnava, Okresný súd Žilina.

Next to the commercial register, there is a register of non-investment funds, non-profit organisation providing services of general interest and register of foundations and certain other registers of specific types of legal persons.

b. Non-public registers

If a joint-stock company or European company has book-entry, including immobilised shares, this fact as well as details about those shares can be found in a statement from commercial register or from its articles of associations which are directly downloadable therefrom. From the articles of associations, it is also necessary to find out whether the list of shareholders of book-entry shares is maintained by the depositary or the company itself: in the first case the identity of owners of book-entry shares and evidencing documents have to be asked from such depositary only, in the second case it is in addition necessary to check whether the information from the depositary correspond to the information about shareholders (owners of shares) in the list of shareholders kept by company itself.

The function of central depositary⁷⁷ in Slovakia is exercised by Centrálny depozitár cenných papierov SR, a.s.⁷⁸. The Slovak central depositary keeps clients' accounts (for its members), owners' accounts (for securities owners) and holders' accounts, (for foreign institutional owners) on which book-entry securities (shares) are registered (two-level register involving the central depositary and its members who keep the aforementioned types of accounts).

The first layer of holders is considered the shareholder, but if security is credited to a nominee account, Slovak central depositary shall include the nominee to the list of shareholders and does not search for information on the beneficial owner. The issuers can access information regarding the holding of the first layer of owners and in case that securities are kept on a member's client accounts also of the second (and final) layer of owners. In case of nominee accounts, issuers can access only the first layer of holders. The issuers request from depositary a list of owners for the first and second level by placing the application for the list of owners/shareholders. The application is submitted in writing on a form either personally or by regular mail. Slovak central depositary supplies the list of owners/shareholders in paper form or on a CD depending on the choice of the issuer and the issuer collects the list personally or the list is delivered to the issuer by regular mail. Processing of the list of owners/shareholders takes on average 20 minutes once all documents are submitted. In case of delivery of the list by regular mail, delivery takes around 2 days; majority of issuers collect the list personally. Central depositary obtains information on beneficial owners on the second level electronically and this is done directly from owners' accounts opened in the books of members, whereas it is mandatory for members to keep the second level of accounts (owner's accounts) of their clients on the technical means provided by the central depositary.

The process of collecting the data on owners/shareholders from the second level is organized and automated in such a way that members of central depositary keep accounts of owners on the technical means of the central depositary. If the issuer asks for the list of owners/shareholders, depositary is authorized to retrieve the data on owners directly from the books of member, because depositary provides the member with technical means for keeping its books. The holder of the account is deemed to be the owner of securities (shares) registered therein, and hence, the excerpt from the securities account (share account) serves as evidence

⁷⁷ Supervised under a license delivered by Úrad pre finančný trh.

⁷⁸ Zákon č. 566/2001 Z.z. o cenných papieroch a investičných službách a o zmene a doplnení niektorých zákonov v znení neskorších predpisov

of ownership of book-entry shares of a Slovak joint-stock company with book-entry shares. The central depository also operates the clearing and settlement systems of transactions with securities, including shares, on the stock exchange.

Details on the shareholders/holder which are registered are the following: (i) - identification of security in co-ownership, (ii) amount of securities, (iii) type of person, (iv) identification of the natural person (birth registry number, name, surname, title), (v) identification of the legal person (ID number, name), (vi) address of the seat or permanent residence, (vii) - type of account, (viii) - data on suspension of disposal right for a given ISIN and for identification of security in coownership⁷⁹.

Except for joint-stock companies with book-entry shares where the register of shareholders or securities account documenting shareholders are kept by the central depository or its member, Slovak legal persons are obliged to continuously evidence their shareholders or members in a list of shareholders or members, sometimes also called register of shareholders or member. This list or register should usually be stored at the place of the registered seat of the legal person. Such list or register should contain information on interest and its owners (shareholders / members) which allow to identify the amount and the nature of the interest as well as its owners and, possibly, include all preceding shareholders or members in continuous timeline record without any gaps, although this may always not be the case.

C. Beneficial ownership and trust registers

i. Beneficial ownership register

The register of beneficial owners of recipients of public contracts was established as of 1 November 2015⁸⁰. A general register of beneficial owners was not established by the end of 2017, but was foreseen by a draft amendment to the Slovak Antimoney Laundering Act⁸¹ which at that time was in the legislative procedure in the Slovak Parliament – the entry in force, if adopted, was foreseen for 1 March 2018 and 1 July 2018 respectively. According to this draft amendment, Slovak legal persons would be obliged to file their beneficial owner(s) to the registers where they are otherwise registered which then would be concentrated in a central register administered by the Slovak statistical office. The register was not foreseen to be open to the general public, but to selected public authorities only⁸². No guidance document providing information about how to identify and evidence the beneficial ownership interest (corporate ownership structure), in particular in a situation of indirect ownership (complex corporate ownership structure) was issued by the end of 2017.

ii. Trusts and trust registers

There are no trusts, and hence, also no trust registers in Slovakia.

⁷⁹ Market Analysis of Shareholder Transparency Regimes in Europe^{ca}), ECB, 11 February 2011, http://www.ecb.int/paym/t2s/progress/pdf/subtrans/st_analysis_regimes.pdf?530bfb9b8ae49fc963368560ed5ea9ca

⁸⁰ Register užívateľov konečných výhod: <https://www.uvo.gov.sk/register-konecnych-uzivatelov-vyhod-427.html>

⁸¹ Návrh zákona, ktorým sa mení a dopĺňa zákon č. 297/2008 Z. z. o ochrane pred legalizáciou príjmov z trestnej činnosti a o ochrane pred financovaním terorizmu a o zmene a doplnení niektorých zákonov.

1.1.3. Austria

A. Information about composition of corporate ownership structure (beneficial ownership interest)

In the Austria, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure)

- joint-stock company: **Aktiengesellschaft (AG)**,
- European company: **Europäische Gesellschaft (EG/SE)**,
- limited liability company: **Gesellschaft mit beschränkter Haftung (GmbH/HesmbH)**,
- limited partnership: **Kommanditgesellschaft (KG)**, **Kommandit-Erwerbsgesellschaft (KEG)**,
- general partnership: **Offene Handelsgesellschaft (OHG)**, **offene Gesellschaft (OG)**, **offene Erwerbsgesellschaft (OEG)**,
- cooperative: **Genossenschaft (Gen)**,
- European cooperative company: **Europäische Genossenschaft (SCE)**, and
- different types of public enterprises.

Moreover, the following corporations with partial legal personality - which in most cases will have a role of owned and controlled entities within complex corporate structures - exist under Austrian law.

- registered branch: **Zweigniederlassung**.

In addition, theoretically – and in practice rarely – the following types of non-profit legal persons can be part of corporate ownership structures, both as owned and controlled subjects and owning and controlling subjects within those structures:

- association (**Verein**),
- foundation (**Privatstiftung**),
- certain other specific types of non-profit legal persons.

Under the Privatstiftungsgesetz a Privatstiftung is a legal person. It can be founded by one or more individuals or legal entities. Its structure largely resembles that of a limited company, but it has beneficiaries instead of proprietors. It must be domiciled in Austria and entered in the Commercial Register. An Austrian private foundation is established by the execution of a foundation deed and becomes a legal entity by its registration with the companies register (incorporation). All founders have to be designated in this foundation deed. The foundation deed might be inspected at the companies register; therefore, it usually does not contain

confidential details and non-mandatory contents / regulations, which will rather be laid down in the supplementary deed). The (non-mandatory) supplementary deed has to be submitted to the tax authorities, but not to the companies register (and thus is not disclosed to the public) and may contain: (i) the designation of beneficiaries and/or the type and extend of distributions; (ii) detailed rules on distributions; and (iii) other issues.

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

The Austrian company register⁸³ registers information about Austrian companies and certain of their corporate documents, such as the articles of association, which without registration in the document archive of the company register cannot enter in force. The access to the Austrian company register is via internet⁸⁴ or via special access places⁸⁵.

Publicly verified statements of the Austrian corporate registry are delivered by regional courts. Austrian company register contains information about owners (shareholders) of personal companies, including limited liability companies, limited partnerships, general partnerships and similar.

b. Non-public registers

The transformation of paper shares (securities) of Austrian joint-stock companies into the book-entry form was achieved by way of immobilisation on the basis of the Austrian Securities Custody Act which was largely inspired by a similar German Securities Custody Act.⁸⁶ In Austria the role of the central depository maintaining securities accounts where book-entry shares of Austrian joint-stock companies and European companies with the seat in Austria can be registered is played by Österreichische Kontrollbank Aktiengesellschaft (OeKB). OeKB can create own accounts or accounts maintained for their clients for credit institutions, financial intermediaries, members of the stock-exchange, foreign central depositories, persons running a clearing and/or settlement system as well as legal and natural persons providing that they fulfill the access conditions⁸⁷, in particular that they create with OeKB also a cash account⁸⁸.

The Austrian Central Depository – following the differences enshrined in the Austrian law – differentiates between registered book-entry securities (shares) and book-entry bearer securities (shares). However, the information on the owner(s) of such shares registered through the central depository does not differ. If the owner of any of the two types of securities (shares) is a natural person, then his/her name, date of birth, address, amount of shares or share numbers and nominal value, proof of transfer of shares is recorded; if the shareholder (securities owner) is a legal entity, then its name, corporate seat, address,

⁸³ Firmenbuch.

⁸⁴ <https://firmenbuch.at/>

⁸⁵ Verrechnungsstellen

⁸⁶ Austrian Securities Custody Act of 22 October 1969, BGBl. Nr. 424/1969, (in force as of 1 January 1970) účinný od 1. ledna 1970). This Act replaced the former German Securities Custody Act of 1937 applicable also in Austria, but compared to the version of 1937 content-wise it did not bring any fundamental changes to the concepts of securities, including shares custody in Austria.

⁸⁷ CSD.austria Allgemeine Geschäftsbedingungen OeKB dated 1 September 2011.

⁸⁸ OeKB also operates a clearing and settlement system which through the Central Counterparty Austria GmbH clears and settles trades – sales of securities, including book-entry shares of companies – realised at the Vienna Stock Exchange.

commercial register and commercial register number, amount of shares or share numbers and nominal value, proof of transfer of shares is registered. Regarding registered book-entry securities (shares), pursuant to the Austrian Supreme Court the shareholders are entitled to access to the shareholders register. For listed bearer shares, the proof ownership is provided by deposit confirmation which evidences a capacity of a person as a shareholder (owner of bearer book-entry securities).

Under the Austrian law the person registered in the shareholders register is deemed to be the shareholder and has the right to exercise its right deriving from his position as shareholder (right to vote, entitlement to dividends etc). The old and the new owner (shareholder) has to inform the company about the transfer of shares so that the new shareholder can be registered in the shareholder register. The shareholder register and the announcements of information to be entered into the shareholder register contain with respect to the natural person: the name, date of birth, address, amount of shares or share numbers and nominal value, proof of transfer of shares; with respect to a legal person: the name, corporate seat, address, commercial register and commercial register number, amount of shares or share numbers and nominal value, proof of transfer of shares.

This list or register should usually be stored at the place of the registered seat of the legal person. Such list or register should contain information on interest and its owners (shareholders / members) which allow for identification of the amount and the nature of the interest as well as its owners and, possibly, include all preceding shareholders or members in continuous timeline record without any gaps, although this may always not be the case.

C. Beneficial ownership and trust registers

i. Beneficial ownership register

The Austrian register of beneficial owners (Transparenzregister) will be established as of 15 January 2018 by the Act establishing Register of Beneficial Owners⁸⁹. The access is provided to selected public authorities, financial market institutions and any natural or legal persons who can have a legitimate interest as it is required by the Fourth Antimoney Laundering Directive. Every Austrian legal person has an obligation to file in this register the information about its beneficial owner(s) – natural persons(s) and a description of the beneficial ownership interest (corporate ownership structure)⁹⁰. A general guidance document about how to identify and evidence the beneficial ownership interest (corporate ownership structure), in particular in

⁸⁹ Wirtschaftliche Eigentümer Registergesetz – WiEReG sowie Änderung des Finanzmarkt-Geldwäschegesetzes, des Finanzstrafgesetzes, der Notariatsordnung, der Rechtsanwaltsordnung, des Devisengesetzes, des Bankwesengesetzes, der Bundesabgabenordnung usw. BGBl. I Nr. 136/2017.

⁹⁰ Bei der Feststellung und Überprüfung von indirekten wirtschaftlichen Eigentümern ist es erforderlich, für jeden relevanten Rechtsträger bis zum indirekten wirtschaftlichen Eigentümer einen entsprechenden landesüblichen Nachweis über die Eigentums- und Kontrollverhältnisse (z.B. Firmenbuch, Aktienbuch oder Aktienregister, Gesellschaftsverträge, Liste der Gesellschafter, Certificate of Shareholders, Treuhandschaftsverträge o.ä.) einzuholen. Auf Basis dieser Dokumente und Informationen ist die Erstellung einer grafischen Darstellung der Beziehungen bis zum wirtschaftlichen Eigentümer in Form eines vollständigen Organigramms unter Angabe der Anteile von Aktien, Beteiligungen, Kontroll- oder Stimmrechte zum besseren Verständnis komplexer Eigentums- und Kontrollverhältnisse empfehlenswert. An das Register gemeldet werden müssen allerdings nur die direkten und indirekten wirtschaftlichen Eigentümer sowie die dazugehörigen obersten Rechtsträger. Eine Meldung der Zwischenebenen ist nicht vorgesehen.
<https://www.bmf.gv.at/finanzmarkt/register-wirtschaftlicher-eigentuemer/Uebersicht/Verwendung.html>,
<https://www.bmf.gv.at/finanzmarkt/register-wirtschaftlicher-eigentuemer/Uebersicht/Organigramm.png?69zge5>

a situation of indirect ownership (complex corporate ownership structure) was issued at the end of 2017⁹¹.

ii. Trusts and trust registers

Except for Treuhandenschaft which is, however, contractual relationship only, there are no trusts as such in Austria, and hence, also no trust registers in Austria. However, the function of the trust can be taken on by a private foundation (Privatstiftung)⁹².

⁹¹ Fallbeispiele zur Ermittlung des wirtschaftlichen Eigentümers, <https://www.bmf.gv.at/finanzmarkt/register-wirtschaftlicher-eigentuemer/Uebersicht/Fallbeispiele.html>

⁹² See above section A.

1.1.4. Germany

A. Information about composition of corporate ownership structure (beneficial ownership interest)

In Germany, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure):

- joint-stock company: **Aktiengesellschaft (AG)**,
- European company: **Europäische Gesellschaft (EG/SE)**,
- limited liability company: **Gesellschaft mit beschränkter Haftung (GmbH)**,
- limited partnership: **Kommanditgesellschaft (KG)**,
- limited partnership with shares: **Kommanditgesellschaft auf Aktien (KGA)**,
- general partnership: **Offene Handelsgesellschaft (OHG)**,
- special partnership, including special partnership with limited liability (**Partnerschaft (PartG)**, **Partnerschaftsgesellschaft mit beschränkter Berufshaftung (PartGmbH)**)
- cooperative: **Genossenschaft (Gen)**,
- European cooperative company: **Europäische Genossenschaft (SCE)**,
- various kinds of forms of public enterprises.

Moreover, the following corporations with partial legal personality - which in most cases will have a role of owned and controlled entities within complex corporate structures - exist under German law.

- registered branch: **Zweigniederlassung**,

In addition, theoretically – and in practice rarely – the following types of non-profit legal persons can be part of corporate ownership structures, both as owned and controlled subjects and owning and controlling subjects within those structures:

- association (**Verein**),
- foundation (**Stiftung**),
- certain other specific types of non-profit legal persons.

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

In Germany the key public register for corporations as well as certain other legal persons, such as certain associations is the Handelsregister⁹³. It is maintained and operated by the Ministry of Justice of the Land Nordrhein-Westfalen. The access to statements and documents⁹⁴ regarding corporations and other legal persons registered in the Handelsregister is paid⁹⁵. The German Handelsregister is linked to the German Unternehmensregister⁹⁶ which in addition to the Handelsregister contains certain additional documents regarding German corporations, such as financial accounting statements and management reports.

Shareholders of limited liability companies are registered in the Handelsregister⁹⁷. The identification of shareholders of German joint-stock companies is made possible thanks to the obligation to announce the in the Bundesanzeiger⁹⁸ the fact that a direct shareholder alone or acting jointly with others exceeded the threshold of 25 % or 50 %⁹⁹. However, this obligation concerns only those direct shareholders who are legal persons¹⁰⁰; reason resides in the aim of the regulation of shareholding threshold announcements¹⁰¹ which primarily serves as a means against excessive concentration of companies, not for the purpose of general shareholder transparency¹⁰². With respect to shareholders (owners) of registered shares the accuracy of the statement that the aforementioned shareholding limit was exceeded can be verified against the information in the register of shareholders of the company in which the shareholding in question was acquired; with respect to bearer paper shares and their owners (shareholders) such verification is unfortunately not possible.

b. Non-public registers

Similarly to Austria, the conversion of paper shares (securities) of German joint-stock companies into the book-entry form was achieved by way of immobilisation on the basis of the German Securities Custody Act of 1937¹⁰³. The entity ensuring the services of the central depository for Germany is the supranational central depository Clearstream Banking

⁹³ www.handelsregister.de

⁹⁴ In electronic form if filed after 2007.

⁹⁵ 1,5 EUR – 4,5 EUR depending on the type of the statement from the register.

⁹⁶ www.unternehmensregister.de

⁹⁷ Art. 40 GmbH Gesetz.

⁹⁸ www.bundesanzeiger.de

⁹⁹ §§ 20 and 21 of the German Aktiengesetz (AktG).

¹⁰⁰ §§ 20 and 21 AktG.

¹⁰¹ These announcements are normally filed with the register in the scanned pdf form so it is not very easy to search them.

¹⁰² Hüffer, U.: Aktiengesetz, Beckische Kurz-Kommentare, Band 53, Verlag C.H. Beck München, 2010, p. 92 - 104; Hoffman-Becking, M.: Münchener Handbuch des Gesellschaftsrechts, Band 4. Aktiengesellschaft, C.H. Beckische Verlagsbuchhandlung, 1989, §§ 68 and 69.

¹⁰³ Securities Custody Act („Depotgesetz“) dated 3 February 1937, RGBl. I. S171 (in force as of 1 May 1937).

Frankfurt¹⁰⁴ (Clearstream Banking A.G.)¹⁰⁵. Clearstream Banking Frankfurt acts also as a bank and operates a clearing and settlement system for German stock-exchanges¹⁰⁶.

Under German law, there is a legal presumption that those persons who are entered into the share register are presumed to be the shareholders and are treated as such by the company. Issuers have the information which is in their share register. Also, any person registered in the share register is obliged to disclose, upon request of the issuer, whether it is the legal owner of the shares and – if not – for whom it holds the shares. This applies accordingly to the next layer and so on, up to the beneficial owner. In addition, the issuer's statutes may provide for further requirements, under which the entry in the share register is permissible, e.g. disclosure obligations or maximum limits for the entry of nominees.

The German central depositary registers the scope of rights of securities account holders to the securities (shares)¹⁰⁷. Unlike, for example the UK central depositary (CREST¹⁰⁸), the German central depositary and linked depositaries within the holding chain act as holders of rights to securities (shares) registered on an account belonging to the account holder. Neither the central depositary nor other linked depositaries have an ownership right to such securities (shares); such right belongs to the (final) account holder and the owner of such securities registered there in favour of the depositary¹⁰⁹.

Information about shareholders (owners of shares) who hold and/or own their shares via the German central depositary are accessible for public authorities only through an automated application CASCADE-RS. The German tax authorities and other public authorities can ask issuers for information about shareholders, in particular whether they hold shares on their own account or for someone else. If a disclosure request originating from the issuer is not complied with, the shareholder's voting rights are forfeited. If a disclosure request originating from a public authority is not complied with, the person that refuses to answer is also subject to a regulatory fine. The intermediary has to respond within a "reasonable period of time". In practice, one or two weeks are standard. The data about shareholders at different levels: name, date of birth or date of foundation, address, state, number of shares, information whether the shares are held on their own or for third-parties. These beneficial owner data must be reported German law, provides for the issuers' right to ask the person entered in the share register and further layers. In addition, the issuer's statutes may provide for further disclosure obligations¹¹⁰.

For shares of companies traded on one of the German stock-exchanges once these have changed their owner on any of such stock-changes, this information is transmitted through the aforementioned application Clearstream Banking's CASCADE-RS to which custodian banks

¹⁰⁴ The public oversight over Clearstream Banking Frankfurt is exercised by the *Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)*.

¹⁰⁵ Clearstream Banking A.G. is the successor of Deutscher Kassenverein A.G., which was established following the merger of six different „banking associations“ (*Kassenvereine*) with the Frankfurter Kassenverein A.G., and later renamed to Clearstream Banking A.G.

¹⁰⁶ Frankfurt stock-exchange, Berlin-Bremen stock-exchange, Düsseldorf stock-exchange, Hamburg stock-exchange, Hannover stock-exchange, Bavarian stock-exchange and Baden-Württemberg stock-exchange.

¹⁰⁷ § 14 (1) of the German Securities Custody Act.

¹⁰⁸ See below section 1.1.8.B.

¹⁰⁹ The account holder is considered to be a sui generis co-owner of securities, including shares, registered on his/her securities account and at the same time an indirect holder of his/her own right to such securities.

¹¹⁰ Market Analysis of Shareholder Transparency Regimes in Europe“, ECB, 11 February 2011, http://www.ecb.int/paym/t2s/progress/pdf/subtrans/st_analysis_regimes.pdf?530bfb9b8ae49fc963368560ed5ea9ca, p. 25.

and registrars have an interface. In cross border situations there are a few nominees that serve as custodians for cross-border shareholdings. They feed CASCADE-RS with the data of themselves as nominees, but the information on further layers of the holding chain is no more forwarded¹¹¹.

Except for joint-stock companies with book-entry shares where the register of shareholders or securities account documenting shareholders are kept by the central depositary or its member, German legal persons are obliged to continuously evidence their shareholders or members in a list of shareholders or members, sometimes also called register of shareholders or member. This list or register should usually be stored at the place of the registered seat of the legal person. Such list or register should contain information on interest and its owners (shareholders / members) which allow for identification of the amount and the nature of the interest as well as its owners and, possibly, include all preceding shareholders or members in continuous timeline record without any gaps, although this may always not be the case.

C. Beneficial ownership and trust registers

i. Beneficial ownership register

The German register of beneficial owners (Transparenzregister¹¹²) was established as of 26 June 2017 by the amendment of the German Antimoney Laundering Act (GwG) and the adoption of implementing regulations¹¹³. The access is provided to selected public authorities, financial market institutions and any natural or legal persons who can have a legitimate interest as it is required by the Fourth Antimoney Laundering Directive. Every German legal person has an obligation to file in this register the information about its beneficial owner(s) – natural persons(s) and a description of the beneficial ownership interest (corporate ownership structure) unless such information can be obtained from other existing German public registers. A general guidance document about how to identify and evidence the beneficial ownership interest (corporate ownership structure), in particular in a situation of indirect ownership (complex corporate ownership structure) was issued at the end of 2017¹¹⁴.

ii. Trusts and trust registers

Except for Treuhand which is, however, contractual relationship only, there are no trusts, and hence, also no trust registers in Germany¹¹⁵.

¹¹¹ Market Analysis of Shareholder Transparency Regimes in Europe“, ECB, 11 February 2011, http://www.ecb.int/paym/t2s/progress/pdf/subtrans/st_analysis_regimes.pdf?530bfb9b8ae49fc963368560ed5ea9ca, p. 25 an.

¹¹² <https://www.transparenzregister.de>

¹¹³ Transparenzregisterbeleihungsverordnung TBeIV and Transparenzregisterdatenübermittlungsverordnung TrDüV.

¹¹⁴ Transparenzregister – Fragen und Antworten des Bundesverwaltungsamts (<https://www.transparenzregister.de>)

¹¹⁵ German law does not have a specific concept that works as the Anglo-American “trust”. Fiduciary relationships exist only in the form of “fiduziarische Treuhand” (a fiduciary trust) - a construction by which an individual transfers the full right in rem to the other individual, who is obliged to deal with the assets in the manner specified by the contract.

1.1.5. Luxembourg

A. Information about composition of corporate ownership structure (beneficial ownership interest)

In Luxembourg, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure)

- joint-stock company: **société anonyme (SA), société par actions simplifiée (SAS)**,
- European company: **société européenne (SE)**,
- limited liability company: **société à responsabilité limitée (SARL), la société à responsabilité limitée simplifiée (SARLS)**,
- limited partnership: **société en commandite simple (SCS)**,
- limited partnership with shares: **société en commandite par actions (SCA)**,
- general partnership: **société en nom collectif**,
- cooperative: **société cooperative**,
- European cooperative company: **société coopérative européenne (SCE)**,
- different types of public enterprises, such as les **établissements publics de l'Etat et des communes**.

Moreover, the following corporations with partial legal personality - which in most cases will have a role of owned and controlled entities within complex corporate structures - exist under Luxembourg law.

- registered branch: **filiale (succursale)**.

In addition, the following types of non-profit legal persons can be part of corporate ownership structures, both as owned and controlled subjects and owning and controlling subjects within those structures:

- non-profit association: **association sans but lucratif**,
- private foundation: **fondation** (resembling to certain extent to a trust),
- certain other types of associations, such as associations d'épargne pension, associations agricoles, associations d'assurance mutuelle etc.

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

The relevant source of information about corporate entities and certain other legal persons in Luxembourg is the Register of commerce and companies (Registre de commerce et des sociétés (RCS))¹¹⁶. The legal regulation of the Luxembourgish RCS was reformed in 2016¹¹⁷: before the information on companies and other legal persons was a part of Mémorial C¹¹⁸ of the Luxembourg Official Journal. Luxembourg RCS is operated by the association GIE RCSL and supervised by the Ministry of Justice.

Luxembourg RCS contains identification data, corporate and financial documents about Luxembourg legal persons registered therein and provide evidence of the existence of those legal persons and their basic corporate data. Certain information regarding companies and non-profit legal persons, such as their identification number, date of registration, name and legal form, the address of the company and the list of documents submitted to the RCS as of 2006 can be obtained free of charge whereas an official statement about a registered company or non-profit association and the filed financial accounts can be obtained only upon payment of a fee¹¹⁹.

As far as information about shareholders are concerned, RCS registers and makes accessible information about shareholders (direct owners) of limited liability companies, limited partnerships and cooperatives. Regarding non-profit organisations, the Luxembourg ASBL member list needs to be filed with the Luxembourg RCS and has to indicate, in alphabetical order, the names, first names, address and nationality of the ASBL members: the member list has to be recorded when filed but is not published¹²⁰. By contrast, as far as the private foundation are concerned, in order to protect the anonymity of the participants, the administrators must send in an extract to the trade register mentioning only the name of the foundation. Although bookkeeping and financial statements are required, the accounts are not filed or published in the Luxembourg RCS.

b. Non-public registers

Following the adoption of the Act on circulation of securities and other fungible financial instruments in 2001, Luxembourg law ceased to make distinction between registered and bearer securities, including shares, in book-entry form¹²¹. The services of central depositary in Luxembourg, including registration of book-entry shares of Luxembourgish joint-stock companies and European companies with its seat in Luxembourg, are provided by the

¹¹⁶ <https://www.rcsl.lu>

¹¹⁷ Loi du 27 mai 2016 portant réforme du régime de publication légale relatif aux sociétés et associations; loi modifiée du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises et modifiant certaines autres dispositions légales.

¹¹⁸ <http://legilux.public.lu/memorialC/archives>

¹¹⁹ Articles 25 et 27 du règlement grand-ducal modifié du 23 janvier 2003 portant exécution 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. https://www.rcsl.lu/mjrcs/jsp/webapp/static/mjrcs/fr/mjrcs/tarifs.html?FROM_MENU=true&time=1519718094896&pageTitle=menu.item.geninfoprices¤tMenuLabel=menu.item.geninfoprices

¹²⁰ Art. 10 of the modified Law of the 21st of April 1928 on associations and non-profit foundations.

¹²¹ *Loi du 1^{er} août 2001 concernant la circulation de titres et d'autres instruments fongibles*, "Mémorial A n° 10, 31.08.2001, p. 2180.

international central depository Clearstream - Clearstream Banking Luxembourg.¹²² Clearstream Banking Luxembourg is the successor of the CEDEL Bank CEDEL¹²³ which has been providing central depository services as of 1970. Since 2010 the second central depository LuxCSD exists and supplies complementary services to Clearstream Banking Luxembourg. LuxCSD is co-owned by the Luxembourg Central Bank and Clearstream International.

Except for joint-stock companies with book-entry shares where the register of shareholders or securities account documenting shareholders are kept by the central depository or its member, Luxembourg legal persons are obliged to continuously evidence their shareholders or members in a list of shareholders or members, sometimes also called register of shareholders or member. This list or register should usually be stored at the place of the registered seat of the legal person. Such list or register should contain information on interest and its owners (shareholders / members) which allow for identification of the amount and the nature of the interest as well as its owners and, possibly, include all preceding shareholders or members in continuous timeline record without any gaps, although this may always not be the case.

C. Beneficial ownership and trust registers

i. Beneficial ownership register

The register of beneficial owners will be established as of the entry into force of the proposal of Act nr. 7217¹²⁴ on the creation of register of beneficial owners (REBECO) submitted to the Luxembourg Chamber of Deputies on 6 December 2017. Legal persons established in Luxembourg¹²⁵ will have to register their beneficial owner(s) in this register within 6 months as of the entry into force of this Act. The register shall be administered by authority of the Ministry of Justice. No guidance document providing information about how to identify and evidence the beneficial ownership interest (corporate ownership structure), in particular in a situation of indirect ownership (complex corporate ownership structure) was issued by the end of 2017.

The information contained in the REBECO will be made available electronically only to national competent public authorities, including but not limited to the prosecutor, the *Commission de Surveillance du Secteur Financier* (CSSF), the *Commissariat aux Assurances* (CAA) and tax administrations. Self-regulatory bodies (such as the Bar Council, Notary Chamber and the *Institut des Réviseurs d'Entreprises*) will also have a limited electronic access to the REBECO. Certain entities (such as for instance credit institutions, professionals of the financial sector, insurance undertakings and UCITS management companies) will have a limited electronic access to the REBECO which may be used only where obliged entities are required to carry out client due diligence measures in relation to their clients. The access may

¹²² Other entities of the Clearstream group are Clearstream Services Luxembourg, Clearstream Nominees London, Clearstream International UK Branch London and Clearstream Operations Prague, s.r.o. Their parent company is Luxembourgish Clearstream International S.A. which is owned by the German Clearstream Holding Frankfurt A.G., which in turn is owned and controlled by Deutsche Börse AG.

¹²³ CEDEL was the abbreviation of the French Centrale de Livraison de valeurs mobilières Luxembourg.

¹²⁴ Projet de loi n° 7217.

¹²⁵ Joint-stock companies (*sociétés anonymes*), limited liability companies (*sociétés à responsabilité limitée*), partnerships limited by shares (*sociétés en commandite par actions*), common limited partnerships (*sociétés en commandite simple*), special limited partnerships (*sociétés en commandite spéciale*), foundations, civil companies, interest groupings (GIE), European interest groupings (GEIE) and investment funds (*fonds d'investissement*). Listed companies under certain circumstances, common funds (FCPs) and branches of foreign companies are out of scope.

also be granted to any person or organisation that (i) can demonstrate a legitimate interest in relation to AML, (ii) is resident in Luxembourg and (iii) has made an official written and duly justified request in this respect. Such access is subject to the prior approval of a formal commission to be created by the Minister of Justice.

ii. Trusts and trust registers

The function of the trust can be taken on by a private foundation (Privatstiftung)¹²⁶ or a fiduciary contract. By the end of 2017, fiduciaries were obliged to maintain at their seat the information about the settlor (founder), trustee, beneficiaries and, if they exist protectors. On 6 December 2017 a proposal of an Act according to which the aforementioned information would have to be registered in a central registry was submitted to the Chamber of Deputies¹²⁷. Once in force, the aforementioned information will have to be registered in the new register within six month from the moment of entry in force of the proposed Act. The register shall be administered by authority of the Administration de l'Enregistrement et des Domaines.

¹²⁶ See above section A.

¹²⁷ Projet de loi n°7216.

1.1.6. Belgium

A. Information about composition of corporate ownership structure (beneficial ownership interest)

In Belgium, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure):

- joint-stock company: **société anonyme (SA)**,
- limited liability company: **société privée à responsabilité limitée (SPRL)**, including its various sub-forms, such as SPRL à finalité sociale, société privée à responsabilité limitée unipersonnelle (SPRLU), société civile sous forme de SPRL, société privée à responsabilité limitée unipersonnelle à finalité sociale,
- European company: **société européenne (SE)**,
- limited partnership: **société en commandite simple**, including its various sub-forms, such as société civile sous forme de société en commandite simple, société en commandite simple à finalité sociale,
- limited partnership with shares: **société en commandite par actions**, including its various sub-forms, such as société civile sous forme de société en commandite par actions, société en commandite par actions à finalité sociale,
- general partnership: **société en nom collectif**, including its various sub-forms, such as société civile sous forme de société en nom collectif, société en nom collectif à finalité sociale,
- cooperative with limited and unlimited liability): **société coopérative à responsabilité limitée et illimitée**, including its various sub-forms, such as société coopérative à responsabilité limitée, société coopérative à responsabilité illimitée, société coopérative à responsabilité illimitée et solidaire, société coopérative de participation, société coopérative à responsabilité limitée, société coopérative de participation, société coopérative, société coopérative à responsabilité illimitée de droit public, société coopérative à responsabilité illimitée, coopérative de participation, de droit public, société coopérative à responsabilité limitée de droit public, société coopérative à responsabilité limitée, coopérative de participation, de droit public, société coopérative de droit public, société civile sous forme de société coopérative à responsabilité illimitée, société civile sous forme de société coopérative à responsabilité limitée, société coopérative à responsabilité illimitée à finalité sociale, société coopérative à responsabilité limitée à finalité sociale, société coopérative à responsabilité illimitée et à finalité sociale, société coopérative à responsabilité limitée à finalité sociale,
- European cooperative society: **société coopérative européenne (SCE)**, and
- different types of public enterprises.

Moreover, the following corporations with partial legal personality - which in most cases will have a role of owned and controlled entities within complex corporate structures - exist under Belgian law.

- Branches of Belgian legal persons: **succursale** or **établissement**.
- various types of foreign branches and establishments in Belgium: entreprises étrangères, including their various sub-forms, such as société étrangère, associations étrangères privées avec établissement, agence, bureau, succursale en Belgique, société congolaise, organismes publics étrangers ou internationaux société étrangère avec un bien immobilier en Belgique (avec personnalité juridique), société étrangère sans établissement belge avec représentant responsable TVA, société étrangère sans établissement belge cotée en bourse, société étrangère avec un bien immobilier en Belgique (sans personnalité juridique),

In addition, theoretically – and in practice rather rarely – the following types of non-profit legal persons can be part of corporate ownership structures, both as owned and controlled subjects and owning and controlling subjects within those structures:

- associations (**association sans but lucratif (ASBL)**),
- international association (**association internationale sans but lucratif (AISBL)**),
- foundation (**fondation**).

One can encounter the following special types of Belgian legal persons of mostly non-profit character: association of co-owners (association de co-propriétaires), pension financing organisation (organisme de financement de pensions), association of mutual insurance companies (association d'assurances mutuelles), insurance companies / union of insurance companies (mutualité / société mutualiste / Union nationale de mutualités), professional union (union professionnelle), international scientific organisation established under Belgian law (organisation scientifique internationale de droit belge), non-profit institution: (institution sans but lucrative), syndicate (syndicat).

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

Information about corporate subjects registered in Belgium are contained in the Belgian corporate registry (la Banque carrefour des entreprises (BCE))¹²⁸. The Belgian BCE is operated under the authority of the Belgian Ministry of Finance (SPF Economie, P.M.E., Classes moyennes et Energie)¹²⁹. The Belgian BCE includes the basic information about the legal persons and other entities registered therein. The access to the Belgian BCE is online¹³⁰

¹²⁸ Loi portant insertion du Livre III " Liberté d'établissement, de prestation de service et obligations générales des entreprises ", dans le Code de droit économique et portant insertion des définitions propres au livre III et des dispositions d'application de la loi propres au livre III, dans les livres I et XV du Code de droit économique, 17 JUILLET 2013.

¹²⁹ <http://economie.fgov.be/en/fps/contact/>

¹³⁰ <http://kbopub.economie.fgov.be/kbopub/zoeknummerform.html>

and free of charge. Specific type of access to the information in the Belgian BCE can be granted to public authorities¹³¹.

Specifically, it comprises information not only about corporate entities, including branches and also addresses of business premises in Belgium, but also about non-profit legal persons and public entities¹³². The research possibilities in Belgian BCE are in French, Dutch, German and English. The information registered in the Belgian BCE appear there the day after they were registered; if registered over the weekend they appear on the upcoming Tuesday.

b. Non-public registers

The conversion of paper securities, including paper shares, into the book-entry form started by the adoption of the Belgian Royal Ordinance no. 62 of 11 November 1967 ensuring the circulation of financial instrument¹³³ and was achieved by the full dematerialisation of securities, including shares of joint-stock companies as of 31 December 2013.¹³⁴ For Belgium the central depositary registering book-entry shares in Belgian joint-stock companies and their owners (shareholders) is Euroclear Belgium,¹³⁵ under an earlier name CIK.¹³⁶ At the securities (shares) account maintained in the Euroclear Belgium system can in principle be all shares of Belgian joint-stock companies. Euroclear Belgium creates for its members (intermediaries) as many accounts as it wishes to have there where the intermediary can hold securities (shares) on its own account or for his clients (other intermediaries or ultimate owners (shareholders))¹³⁷ while each account can be further sub-divided for individual owners and also for individual types of securities (shares)¹³⁸.

For book-entry securities deposited with the Belgian central depositary, the depositary can provide to the issuer, upon request, a view on financial intermediaries holding the given security, however, there is no legal framework in Belgium, which would allow Belgian issuers to request identification of all shareholders. A shareholder holding book-entry bearer shares can request the issuer to register him in the issuer register. The shareholder can also request his erasure from the issuer register. The registered shares are not tradable on the stock exchange: a shareholder has to request the erasure of his registered securities before selling them on the stock exchange. Since the Belgian central depositary acts as the issuer registrar, he keeps a contractual arrangement with their issuer for managing the issuer register: information in the issuer register contain: name, title, address, legal status, account number, number of shares of their owner¹³⁹.

¹³¹ http://economie.fgov.be/fr/binaries/3_1%20TABLEAU%20Spécificité%20par%20type%20accès%20-administrations%20fin%20FR_tcm326-247372.pdf

¹³² See section 1.2.

¹³³ *Arrêté royal n° 62 du 11 novembre 1967 favorisant la circulation des instruments financiers*,” *Moniteur belge* du 14 novembre 1967, p. 11799.

¹³⁴ *Loi du 14 décembre 2005 portant suppression des titres au porteur*, *Moniteur belge* du 23 décembre 2005.

¹³⁵ The public oversight over Euroclear Belgium is exercised by Banque Nationale de Belgique/Nationale Bank van België a Commission Bancaire, Financière et des Assurances/Commissie voor het Bank- en Financiewezen.

¹³⁶ CIK was an abbreviation for *Caisse Interprofessionnelle de Dépôts et de Virement de Titres/Interprofessionele effectendeposito- en girokas*. CIK byl založen zákonem ke dni which existed as of 1 April 1968.

¹³⁷ Art. 5.1.2. of General Regulation of Euroclear Belgium.

¹³⁸ Art. 5.1.0.3. of General Regulation of Euroclear Belgium.

¹³⁹ Market Analysis of Shareholder Transparency Regimes in Europe“, ECB, 11 February 2011, http://www.ecb.int/paym/t2s/progress/pdf/subtrans/st_analysis_regimes.pdf?530bfb9b8ae49fc963368560ed5ea9ca

Except for joint-stock companies with book-entry shares where the register of shareholders or securities account documenting shareholders are kept by the central depositary or its member, Belgian legal persons are obliged to continuously evidence their shareholders or members in a list of shareholders or members, sometimes also called register of shareholders or member. This list or register should usually be stored at the place of the registered seat of the legal person. Such list or register should contain information on interest and its owners (shareholders / members) which allow for identification of the amount and the nature of the interest as well as its owners and, possibly, include all preceding shareholders or members in continuous timeline record without any gaps, although this may always not be the case.

C. Beneficial ownership and trust registers

i. Beneficial ownership registers

The Belgian register of beneficial owners will be established on the basis of a new Antimoney Laundering Act entered into force on 16 October 2017¹⁴⁰. The register of beneficial owners will be administered by the Belgian Ministry of Economy. However, since by the end of 2017 the relevant implementing regulations have not yet been known, the details as to the information collected, their verification, access to those information etc. cannot be yet given.

ii. Trusts and trust registers

Under Belgian law, it is not possible to create trusts or similar arrangements.

iii. Beneficial owners – ultimate public organisations and other organisations

Apart from the federal state¹⁴¹, regions¹⁴² and local municipalities¹⁴³ can own shareholding interests in corporations. The same shareholding interests can be as well owned by professional associations of public law¹⁴⁴ and other public law organisations.¹⁴⁵

¹⁴⁰ Loi du 18 septembre 2017 relative à la prévention du blanchiment de capitaux et du financement du terrorisme et à la limitation de l'utilisation des espèces

¹⁴¹ Etat, Service public fédéral – ministère.

¹⁴² Province, Autorité provinciale, Région, Communauté, Autorité des Régions et des Communautés (autorités de la Région flamande et de la Communauté flamande, Autorités de la Région wallonne, autorités de la Région de Bruxelles-Capitale, autorités de la Communauté française, autorités de la Communauté germanophone)

¹⁴³ Autorité provinciale, ville et commune, intercommunale, association de projet,

¹⁴⁴ Corporation professionnelle, ordre,

¹⁴⁵ Etablissement public, temporel des cultes / établissement culturel public, centre public d'action sociale, mont-de-piété, polder / wateringue, police locale, prézone, zone de secours, organisme immatriculé par l'ONSS-APL, association prestataire de services, association chargée de mission, régie communale autonome, régie provinciale autonome, association de CPAS, organismes immatriculés pour l'ONP, organismes immatriculés pour l'administration des pensions.

1.1.7. France

A. Information about composition of corporate ownership structure (beneficial ownership interest)

In France, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure):

- joint-stock company: **société anonyme (SA), société par actions simplifiée (SAS)**,
- European company: **société européenne (SE)**,
- limited liability company: **société à responsabilité limitée (SARL), entreprise unipersonnelle à responsabilité limitée (EURL)**,
- limited partnership: **société en commandite (SC)**,
- limited partnership with shares: **société en commandite par actions (SCA)**,
- general partnership: **société civile**,
- professional general partnership: **société civile professionnelle (SCP)**,
- professional partnership with limited liability: **société d'exercice libéral à responsabilité limitée (SELARL)**,
- cooperative: **coopérative**,
- European cooperative company: **société coopérative européenne (SCE)**,
- different types of enterprises of state and public character.

Moreover, the following corporations with partial legal personality - which in most cases will have a role of owned and controlled entities within complex corporate structures - exist under French law.

- registered branch: **filiale**.

In addition, theoretically – and in practice rarely – the following types of non-profit legal persons can be part of corporate ownership structures, both as owned and controlled subjects and owning and controlling subjects within those structures:

- association: **associations selon la loi de 1901**,
- foundation: **fondation**¹⁴⁶,
- federation: **fédération**¹⁴⁷,

¹⁴⁶ Loi du 23 juillet 1987.

- **non-governmental organisation:** organisation internationale non gouvernementale (ONG)¹⁴⁸.

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

The French company register is maintained by French commercial courts (Tribunaux de commerce) and centralised into the Registre du Commerce et des Sociétés¹⁴⁹ with the exception of the department Alsace-Moselle and French overseas territories (DOM-TOM) where the information to the French RCS are provided by the French national Institute of the industrial property (INPI)¹⁵⁰. Legal persons not registered with the French RCS are registered in the SIRENE register administered by the French National Institute of statistics and economic studies (INSEE)¹⁵¹.

Basic information, such as the name, address or registration number of a company¹⁵² about the company can be found free of charge at the www.infogreffe.fr web page. Evidence of the existence and the basic data about the company is provided by the so-called Kbis statement which is available from the same webpage for a charge; corporate documents and financial statements can be obtained thereof as well and also for a charge. The KBis information include information only about sole owners (single shareholder)¹⁵³. Information about shareholders of joint-stock companies can be made available from central depositary and related depositaries since they exist in electronic form only.

b. Non-public registers

French law was one of the first ones which transformed all securities, including all shares of joint-stock companies, into book-entry (electronic) form¹⁵⁴. The electronisation was operated through obligatory dematerialisation under which all securities, including shares, were obligatorily transformed into records on securities account¹⁵⁵ and existing paper securities abolished¹⁵⁶. Although French law does not provide a specific definition of book-entry security, it lays down that they are represented by a record on the account of their owner¹⁵⁷ which has to be maintained either by their issuer or a depositary.¹⁵⁸

The French depositary holding system is organised within a framework of the central depositary Euroclear France¹⁵⁹. Under French law all equity securities, that is in particular shares of joint-stock companies, can exist as records on securities accounts within a depositary holding system. This system is a wholly transparent one since French law obliges

¹⁴⁷ Loi du 1er juillet 1901.

¹⁴⁸ Loi du 18 décembre 1998.

¹⁴⁹ www.infogreffe.fr

¹⁵⁰ Institut national de la propriété industrielle

¹⁵¹ Institut national de la statistique et des études économiques

¹⁵² SIREN / SIRET number

¹⁵³ Associé unique.

¹⁵⁴ Art. 94-II of Act no. 81-1160 of 30 December 1981 which entered into force on 3 November 1984.

¹⁵⁵ Art. 1 of the decree no. 83-359 of 2 May 1983.

¹⁵⁶ As of 1984. Art. 94-II of the aforementioned Act.

¹⁵⁷ Art. R211-1 of the French Code monétaire et financier.

¹⁵⁸ Art. L211-3 a R211-1 of the French Code monétaire et financier.

¹⁵⁹ The public oversight over Euroclear France is exercised by the *Autorité des marchés financiers*.

obliges all joint-stock companies to have information about their shareholders according to a legally defined procedure.¹⁶⁰ Issuers have access by law to all layers of holders.

If shares are registered in a securities account maintained by a depositary within the aforementioned depositary system of Euroclear France, the retrieval of information about the securities account holders who are at the same time owners of securities registered at that account is automatised¹⁶¹: in relation to registered book-entry securities the so-called BRN report¹⁶² is used into which all depositaries within the depositary holding system put information of securities account holders at different levels up to the ultimate owner¹⁶³; in relation to bearer book-entry securities the identification is operated via so-called identifiable bearer securities, including shares¹⁶⁴. If clients of depositaries within the central depositary system are domestic, i.e. French, then they must have in their books all the detailed holdings of the clients of their clients and the message is done at that level thus allowing full beneficial ownership disclosure at a domestic level, but not necessarily if the chain reaches to foreign non-French depositaries. Identifiers of shareholder in the issuer register consists of the first and last name and address, role in account number of shares and certain other information.

Except for joint-stock companies with book-entry shares where the register of shareholders or securities account documenting shareholders are kept by the central depositary or its member, French legal persons are obliged to continuously evidence their shareholders or members in a list of shareholders or members, sometimes also called register of shareholders or member. This list or register should usually be stored at the place of the registered seat of the legal person. Such list or register should contain information on interest and its owners (shareholders / members) which allow for identification of the amount and the nature of the interest as well as its owners and, possibly, include all preceding shareholders or members in continuous timeline record without any gaps, although this may always not be the case.

C. Beneficial ownership and trust registers

i. Beneficial ownership register

The French register of beneficial owners was established as of 1 August 2017 by the Act no. 2016-1691 and the implementing decree¹⁶⁵ as an extension of the French RCS maintained by the French commercial courts¹⁶⁶. The access is provided to selected public authorities¹⁶⁷ and any natural or legal persons who can have a legitimate interest as it is required by the Fourth Antimoney Laundering Directive. Every French legal person has an obligation to file in this register the information about its beneficial owner(s) – natural persons(s) and a description of the beneficial ownership interest (corporate ownership structure)¹⁶⁸: for those French legal persons established before 1 August 2017, they have this obligation until 1 April 2018, for

¹⁶⁰ Art. L228-1 - L228-3 of the French Code monétaire et financier.

¹⁶¹ Market Analysis of Shareholder Transparency Regimes in Europe“, ECB, 11 February 2011, http://www.ecb.int/paym/t2s/progress/pdf/subtrans/st_analysis_regimes.pdf?530bfb9b8ae49fc963368560ed5ea9ca, p. 81 – 88, p. 79 an.

¹⁶² *Bordereau de références nominatives* (BRN).

¹⁶³ Market Analysis of Shareholder Transparency Regimes in Europe“, ECB, 11 February 2011, http://www.ecb.int/paym/t2s/progress/pdf/subtrans/st_analysis_regimes.pdf?530bfb9b8ae49fc963368560ed5ea9ca, p. 81 – 88.

¹⁶⁴ *Titres au porteurs identifiables*.

¹⁶⁵ Loi n° 2016-1691 du 9 décembre 2016à, décret n° 2017-1094 du 12 juin 2017.

¹⁶⁶ See above section B.b.

¹⁶⁷ R.561-27 of the French Code monétaire et financier.

¹⁶⁸ Art. 139 loi n° 2016-1691 du 9 décembre 2016.

those established after 1 August 2017 within 15 days as of their establishment. A general guidance document about how to identify and evidence the beneficial ownership interest (corporate ownership structure), in particular in a situation of indirect ownership (complex corporate ownership structure) was issued in November 2017¹⁶⁹. The court clerks¹⁷⁰ are entitled to verify the conformity of the registered beneficial owner with the legislation and, if necessary, request the legal person concerned to complete the information if considered insufficient by the competent court clerk¹⁷¹.

ii. Trusts and trust register

Since 2007 when trusts (fiducies) were instituted in France¹⁷², these trusts have to be registered in the French trust register¹⁷³ (as of 2010) if they are created by persons within their professional activity for the benefit of another person. The trust register contains the information about the settlor (founder), trustee and beneficiary(ies) as well as certain other information, such as the date of establishment of the fiduciary contract. The access to the trust register is open only to selected public authorities¹⁷⁴. The decree of 10 May 2016 which tried to make the information contained in the trust register fully open to the public was suspended by *Conseil d'État*¹⁷⁵ and later on declared non-constitutional by *Conseil Constitutionnel*.

¹⁶⁹ Fiche pratique : 15 schémas pour identifier les bénéficiaires effectifs dans les sociétés, Conseil national des greffiers des tribunaux de commerce, 17 November 2017, https://www.infogreffe.fr/documents/10179/0/RBE_Fiche_pratique_schemas.pdf

¹⁷⁰ *Greffiers*.

¹⁷¹ Code de commerce Arts. L. 561-46 and Art. R. 123-100.

¹⁷² Art. 2011 – 2031 du Code civil (loi n° 2007-211 du 19 février 2007).

¹⁷³ Registre national des fiducies.

¹⁷⁴ Le juge d'instruction, le procureur de la République, les officiers de police judiciaire, les agents des douanes, les agents du service TRACFIN et les agents habilités de la direction générale des finances publiques chargés du contrôle et du recouvrement en matière fiscale.

¹⁷⁵ Décision du 22 juillet 2017.

1.1.8. United Kingdom

A. Information about composition of corporate ownership structure (beneficial ownership interest)

In the United Kingdom, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure):

- joint-stock company: **public company limited by shares (PLC), public company limited by guarantee having a share capital**,
- European company: **European company (SE)**,
- limited liability company: **private company limited by shares (LTD), private company limited by guarantee having a share capital**,
- limited partnership,
- **general partnership**,
- cooperative: **co-operative**,
- European cooperative company: **European Cooperative Society (ECS)**,
- Scottish partnership,
- various types of state enterprises.

Moreover, the following corporations with partial legal personality - which in most cases will have a role of owned and controlled entities within complex corporate structures - exist under UK law:

- registered branch,
- non-registered branch.

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

The company register for the United Kingdom, including England, Wales, Scotland and Northern Ireland is administered by the Companies House¹⁷⁶. The Companies House is a register containing data and evidence about the existence of UK companies including public and private limited companies, limited liability partnerships, limited partnerships, overseas companies, European Economic interest groupings, European Companies with the exceptions of general partnerships.

¹⁷⁶ <https://www.gov.uk/government/organisations/companies-house>

The research of basic information about UK companies is free of charge. Evidencing documents can be issued by Companies House in the form of certificates, but these certificates will not contain information on shareholders, shareholdings or statement of capital. Nevertheless, UK companies only need to record the immediate, legal owners of their shares, that is to 'take reasonable steps to identify' every person who has, directly or indirectly, significant control over the company and the company must keep a register of certain of the relevant people.

b. Non-public registers

Securities, including shares, are under English law considered to be intangibles (with the exception of paper bearer shares) which are evidenced in a share register¹⁷⁷, irrespective of whether such register is maintained in paper by the company itself or in an electronic form by a central depository. The central depository for the securities, including shares, issued by UK issuers is CRESTCo Limited,¹⁷⁸ which also runs a clearing system of the same name.¹⁷⁹ and which is a subsidiary of the Belgian Euroclear S.A./N.V. CREST registers only book-entry securities¹⁸⁰ which can be transferred between the securities accounts within CREST. CREST as the central depository maintains register of its members (CREST intermediaries, which holds securities directly from the issuers.

Securities accounts in CREST are of three types: omnibus, individual or sponsored¹⁸¹ and are linked to the so-called cash memorandum account maintained by UK credit institutions. For certificated holders, the register records names, addresses and holdings and this could be private individuals, nominees, funds, institutions etc. For dematerialised holders the CSD is the official legal record of shareholders. The CSD provides a real time feed of all changes due to transactions and updated on a copy register held by the registrar. CSD holdings can be private individuals, nominees, funds, institutions etc. In both cases the issuer has access to the registrar when it wants it.

The UK has corporate law (section 793 of the Companies Act) that gives the issuer the right to investigate the layers of any holding. To do so the issuer or his agent sends a section 793 notice to the holder it knows (could be first layer or could be other layers) which forces that holder to disclose holders for which they are acting. This is normally completed by an issuer agent rather than the issuer itself. The issuer can enquire of anyone it knows or has reasonable cause to believe to be interested in the company's shares¹⁸². For dematerialised holders the process with the CSD is 100% automated via their agent. For certificated holders the process is paper based but standard and harmonised across all companies via their agent.

Registers are public so anyone can ask to see the register but can be refused if they are not wanting the data for a 'proper purpose' (e.g. if the register is being asked for in order to market to the holders the issuer can refuse to pass on the data.). Under section 809 and 808

¹⁷⁷ *Société Générale de Paris v. Walker* (1895), 11 App Cas 20.

¹⁷⁸ The public oversight over CRESTCo Limited is exercised by the UK *Financial Services Authority*.

¹⁷⁹ CREST register was developed by the Bank of England by vyvinut anglickou centrální bankou (Bank of England) and reflects the earlier Gilts Office (CGO) which was merged with CREST in 2000.

¹⁸⁰ Securities governed by UK law, Irish law and the law of Isle of Man (CREST Manual, p. 46).

¹⁸¹ *Law Commission Project on Intermediated Investment Securities, Second Seminar – Issues affecting Account Holders and Intermediaries*“, 23 June 2006, p. 14.

¹⁸² Market Analysis of Shareholder Transparency Regimes in Europe“, ECB, 11 February 2011, p. 185:

http://www.ecb.int/paym/t2s/progress/pdf/subtrans/st_analysis_regimes.pdf?530bfb9b8ae49fc963368560ed5ea9ca.

the register must be kept available for inspection by the public. The intermediary has to respond within the time period set by the issuer, subject only to it being ‘reasonable’. Market practice tends to be to allow 48 hours. However, UK issuers have a right to request beneficial owner data (relating to any transaction on the share register) at any time via a section 793 notice or under their articles¹⁸³. Issuer’s Agent has to give notice to participants throughout the holding chain (including Investor CSDs, Funds, Nominees, Custodians, Institutions, Individuals etc) to solicit the required level of detail. The CSD transactional detail is provided in an automated fashion (in a proprietary standard) to issuer agents, who in turn make this information available to issuers. Notices requesting beneficial holder data from the holding chain are disorganised, normally in paper form and do not follow any prescribed format. For beneficial holder data all holding chain participants have a legal obligation (UK Companies Act) to provide the information to the issuer’s agent. For section 793 notices the issuer agent typically receives: (i) full name of the beneficial owner, (ii) full address, (iii) number of shares, (iv) investment manager identity¹⁸⁴.

Since the register at Companies House was not available until 30 June 2016, a company is still required to have its own register between 6 April and 30 June 2016 and it must retain that historical register. Companies who fail to comply with the new PSC register regime may engage criminal liability. There are also obligations on a person who has significant control over a company or LLP to inform the company or LLP (as the case may be) of that fact and provide the relevant information for the PSC register. A company or LLP can impose voting, transfer or other restrictions on the relevant person who fails to comply.

C. Beneficial ownership and trust registers

i. Beneficial ownership register

Since 6 April 2016 all UK companies and LLPs are required to keep and maintain a PSC register including subsidiary and dormant companies. The only exceptions are for certain publicly traded companies: that is UK companies with shares admitted to trading on the main market of the London Stock Exchange, companies with voting shares admitted to trading on a regulated market in the European Economic Area or on specified markets in the USA, Switzerland, Japan and Israel. Companies and LLPs are obliged to investigate, obtain and update information about relevant individuals and legal entities that have control over it and accordingly maintain and update their PSC register¹⁸⁵. Private companies may choose to have the information on persons with significant control held merely at Companies House. They do not necessarily have to maintain a separate persons with significant control register as well.

A general guidance document about how to identify and evidence the beneficial ownership interest (corporate ownership structure), in particular in a situation of indirect ownership

¹⁸³ http://www.opsi.gov.uk/acts/acts2006/ukpga_20060046_en_45

¹⁸⁴ Market Analysis of Shareholder Transparency Regimes in Europe“, ECB, 11 February 2011, http://www.ecb.int/paym/t2s/progress/pdf/subtrans/st_analysis_regimes.pdf?530bfb9b8ae49fc963368560ed5ea9ca, p. 185.

¹⁸⁵ Part 21A of the Companies Act 2006, as amended, and subsequent regulations including the Register of People with Significant Control Regulations 2016, the European Public Limited-Liability Company (Register of People with Significant Control) Regulations 2016, the Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016; the Scottish Partnerships (Register of People with Significant Control) Regulations 2017; and the Information about People with Significant Control (Amendment) Regulations 2017.

(complex corporate ownership structure) was issued¹⁸⁶. A person who exercises significant control (a PSC) over a company is a person which fulfils at least one of the following conditions (i) holds, directly or indirectly, more than 25% by nominal value of the company's shares; (ii) is entitled, directly or indirectly, to exercise more than 25% of the voting rights of the company; (iii) may, directly or indirectly, appoint or remove a majority of the board of directors of the company; (iv) has the right to exercise or actually exercises "significant influence or control" over the company; or (v) has the right to exercise or actually exercises "significant influence or control" over a trust or firm which is not a legal entity but which itself satisfies one of the above conditions. In a LLP a PSC has to meet any one of the following five conditions (i) hold, directly or indirectly, rights over more than 25% of the surplus assets of the LLP on a winding up; (ii) hold, directly or indirectly, more than 25% of the voting rights in the LLP; (iii) hold the right, directly or indirectly, to appoint or remove a majority of those involved in the management of the LLP; (iv) have the right to exercise or actually exercises "significant influence or control" over the LLP; or (v) have the right to exercise or actually exercises "significant influence or control" over a trust or firm which is not a legal entity but which itself satisfies one of the above conditions.

There are specific provisions dealing with interests held through trust arrangements, joint interests and arrangements, nominee arrangements and limited partnerships. There are also provisions dealing with indirect holdings through a chain of entities which may mean that a legal entity itself rather than an individual may need to be included on the PSC register where it would meet the test for significant control if it were an individual and it satisfies certain additional criteria (i.e. it holds its own PSC register or its shares are traded on (i) on the main market of the London Stock Exchange or (ii) on a regulated market of another EEA state or (iii) on certain other markets specified by the PSC regime)¹⁸⁷.

The register will include the individual's name, service address, nationality, date of birth and country of residence and the date on which they become registrable on the PSC register together with confirmation of which of the conditions for being a PSC the individual meets¹⁸⁸. The usual residential address of all people within significant control is kept by the company but does not appear on the registers that are available to the public (the PSC register and the Companies House central register). This information is only accessible by specified authorities and credit reference agencies on request. With regards to a registerable RLE, the register needs to include the RLE's name, registered or principal office address, the legal form of the entity and the law by which it is governed, the register in which it appears and its registration number (if applicable), the date it became a registrable RLE and which of the five conditions for being a PSC it meets.

Certain UK related territories such as Guernsey have their own register of beneficial owners¹⁸⁹ which includes companies registered in Guernsey, foundations registered under Guernsey law and limited liability partnerships registered under Guernsey law. Data received by the Registrar in accordance with the Law will be centralised and retained in electronic

¹⁸⁶ <https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships>

¹⁸⁷ These are known as registrable "relevant legal entities" (RLEs).

¹⁸⁸ There is prescribed wording to be adopted when completing the register. They must also file that information at Companies House and, with effect from 26 June 2017, the information provided to Companies House must be current by filing respective Companies House forms PSC01 to PSC09.

¹⁸⁹ The Beneficial Ownership of Legal Persons (Guernsey) Law, 2017. In force, as of 15 August 2017.

format but on a closed system to ensure that only specific and detailed requests from law enforcement agencies will gain any benefit from the Guernsey register¹⁹⁰.

ii. Trusts and trust registers

The United Kingdom and the English law has a probably the longest tradition of trusts. The main types of trust are express trusts¹⁹¹, bare trusts, interest in possession trusts, discretionary trusts, accumulation trusts, mixed trusts, settlor-interested trusts, non-resident trusts etc. UK trusts involve a trustee, 'settlor' and 'beneficiary'¹⁹².

UK trusts will need to register in the register of trusts by 5 October 2017 and information on existing trusts must be provided by 31 January 2018. Thereafter, the register of trusts will need to be updated once a year, as a minimum. Moreover, most trustees will have to maintain a register of "beneficial owners" in relation to the trusts which they administer and also register those beneficial owners¹⁹³. The trust register may be inspected by any law enforcement authority, which includes HMRC, the Financial Conduct Authority, the National Crime Agency, the various UK police services and the Serious Fraud Office. When a trust meets the criteria to be considered a beneficial owner of a company, such trust's trustee and any other person with effective control over the trust should be registered.

¹⁹⁰ <https://www.gov.gg/article/158845/The-Beneficial-Ownership-of-Legal-Persons-Guernsey-Law-2017>

¹⁹¹ An express trust is one that was deliberately created by a settlor expressly transferring property to a trustee for a valid purpose as opposed to a statutory, resulting or constructive trust

¹⁹² http://www.legislation.gov.uk/uksi/2017/692/pdfs/uksi_20170692_en.pdf

¹⁹³ http://www.legislation.gov.uk/uksi/2017/692/pdfs/uksi_20170692_en.pdf

1.2. Non-EU Member States

1.2.1. Switzerland

A. Information about composition of corporate ownership structure (beneficial ownership interest)

In Switzerland, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure):

- joint-stock company: **Aktiengesellschaft (AG)/Société anonyme (SA)**,
- limited liability company: **Gesellschaft mit beschränkte Haftung (GmbH)/Société à responsabilité limitée (SARL)**,
- limited partnership: **Kommanditgesellschaft (KG) / Société en commandite simple (SCPA)**,
- limited partnership with shares: **Kommanditgesellschaft auf Aktien (KGA)/Société en commandite par actions (SCA)**,
- general partnership: **Kollektivgesellschaft (KIG) / Société en nom collectif (SNC)**,
- cooperative: **Genossenschaft/Société coopérative (Scoop)**,
- so-called simple company: **Einfache Gesellschaft (eG) / Société simple (SS)**.
- various types of public enterprises.

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

Company registers in Switzerland are held at a cantonal level, but have a centralised online access via the ZEFIX application¹⁹⁴ administered by Federal Department of Justice and Police of Federal Office of Justice, including the links to the cantonal registers of Swiss companies¹⁹⁵. A Swiss legal company is registered in the commercial registry of the canton where it has its seat. Certified excerpts of the registry of commerce have to be ordered directly from the cantonal registries of commerce where the legal entity has its seat. Swiss joint-stock companies can have either paper shares or book-entry shares held through accounts via the Swiss central depository.

¹⁹⁴ <https://www.zefix.ch/en/search/entity/welcome>

¹⁹⁵ <https://www.zefix.ch/en/hra>

b. Non-public registers

Swiss law entails a legislative definition of book-entry securities, which includes shares, and which are described as „are personal or corporate rights of a fungible nature against an issuer which are credited to a securities account and may be disposed of by the account holder“¹⁹⁶ as well as „any financial instruments held in custody in accordance with foreign law and any right to such a financial instrument, if it has a comparable function in accordance with such foreign law.“¹⁹⁷ These book-entry securities have to be capable of being recorded at a securities account. From the category of book-entry securities the following are excluded: (i) individually identified paper shares in a separate custody, (ii) securities and global certificates in an individual custody of the final owners and finally (iii) securities, global certificates and book-entry shares kept by their issuer who is not at the same a depository.¹⁹⁸

The function of the Swiss central depository is exercised by SIX SIS which is a part of the ISX Group (Ltd) which runs, amongst other, also the Swiss stock-exchange SIX Swiss Exchange and its London branch, SIX Swiss Exchange Europe and SIX x-clear which provides for those markets clearing and settlement services¹⁹⁹. SIX SIS is linked to all major national and supranational EU-based central depositories mentioned above. If a Swiss company issues shares into the system of intermediated securities holding the relevant depository creates for such a company an issuer register which is public²⁰⁰; the same issuer than collects – non-publicly - information about the owners (shareholders) of shares held at the corresponding owners' accounts.²⁰¹ Regarding the account holders, the following information about them is registered: name, date of birth, nationality, address, country of domicile and certain other information

Except for joint-stock companies with book-entry shares where the register of shareholders or securities account documenting shareholders are kept by the central depository or its member, Swiss legal persons are obliged to continuously evidence their shareholders or members in a list of shareholders or members, sometimes also called register of shareholders or member. This list or register should usually be stored at the place of the registered seat of the legal person. Such list or register should contain information on interest and its owners (shareholders / members) which allow for identification of the amount and the nature of the interest as well as its owners and, possibly, include all preceding shareholders or members in continuous timeline record without any gaps, although this may always not be the case.

C. Beneficial ownership and trust registers

i. Beneficial ownership register

Currently, Switzerland does not have specific legislation requiring to put in place registers of beneficial owners of legal persons and trusts.

¹⁹⁶ Art. 4 (1) of the Swiss Law on Intermediated Securities. <https://www.admin.ch/opc/en/classified-compilation/20061735/index.html>

¹⁹⁷ Inserted by Annex No 14 of the Financial Market Infrastructure Act of 19 June 2015, in force since 1 Jan. 2016

¹⁹⁸ Art. 2 (1) of the Swiss Law on Intermediated Securities.

¹⁹⁹ SIX Group, Six at a Glance, p. 16.

²⁰⁰ Art 6 (2) of the Swiss Law on Intermediated Securities.

²⁰¹ Commentary to the Swiss Law on Intermediated Securities, p. 47.

ii. Trusts and trust registers

There are no trusts, and hence, no trust registers in Switzerland.

1.2.2. United States

A. Information about composition of corporate ownership structure (beneficial ownership interest)

In the United States, the following types of corporations with full legal personality can – and most commonly will – form corporate ownership structures, i.e. will represent constitutive elements of beneficial ownership interest in case where the beneficial owner(s) own(s) and control(s) the examined legal person via an indirect ownership (complex ownership structure).

- C Corporation (C Corp)
- S Corporation (S Corp)
- Limited liability corporation (LLC), and
- other specific types forms depending on internal states' law, such as Inc. (incorporated) and other.

B. Evidentiary value of information about direct corporate ownership

a. Public register(s)

Corporate registers in the United States are administered by the individual states of the Union. Incorporation in one or another U.S. state has to correspond to the place of business activity of such company. The timeliness, availability, and licensing of the basic data about U.S. incorporated entities varies among all 50 states. There is no federal centralised register that would contain all registrations of corporations dispersed across the state. Across those states performance varies widely and in many cases data is not available in bulk, is not machine readable, is not openly licensed etc. Most of U.S. corporations are registered in the state of Delaware.

Better data availability concerns U.S. corporations whose shares (stock) is traded on U.S. financial markets. The information about those corporations can be obtained via the EDGAR database²⁰²: company filings therein are primarily based on the annual report filed on Form 10-K which is the basic corporate document which can be used to search for a company's financial condition and its operations, including in certain situation information about its corporate ownership structure.

b. Non-public registers

In the United States the main central depository is the Depository Trust Company which together with the National Securities Clearing Corporation (NSCC) operating the clearing of transactions with securities are subsidiaries of Depository Trust & Clearing Company (DTCC) which exists and which is the biggest world's depository. DTC via its direct and indirect members registers on securities accounts for their direct and indirect owners book-entry securities, including shares, issued by U.S. companies.

²⁰² <https://www.sec.gov/edgar/searchedgar/companysearch.html>

U.S. law introduced in Art. 8 of the Uniform Commercial Code in 1994 a special, somewhat complicated concept of indirectly held book-entry securities, including shares which, combines the concepts of security, financial asset and security entitlement.²⁰³ Security²⁰⁴ means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer (i) which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer; (ii) which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and (iii) which (A) is, or is of a type, dealt in or traded on securities exchanges or securities markets; or (B) is a medium for investment and by its terms expressly provides that it is a security governed by this Article²⁰⁵. If a security is issued in a registered form it means a form in which (i) the security certificate specifies a person entitled to the security; and (ii) a transfer of the security may be registered upon books maintained for that purpose by or on behalf of the issuer, or the security certificate so state²⁰⁶.

Financial asset can be a security, which includes a right of participation in the issuer's company, that is a share. Financial asset is defined as means (i) a security; (ii) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or (iii) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Article. As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement²⁰⁷. Security entitlement then means the rights and property interest of an entitlement holder with respect to a financial asset²⁰⁸.

The described forms of U.S. book-entry securities are evidenced on securities accounts which means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset. A person acquires a security entitlement if a securities intermediary: (1) indicates by book entry that a financial asset has been credited to the person's securities account; (2) receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or (3) becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account. (c) If a condition of subsection (b) has been met, a person has a security entitlement even though the securities intermediary does not itself hold the financial asset; (d) If a securities intermediary holds a financial asset for another person, and the financial asset is registered in the name of, payable to the order of, or specially indorsed to the other person, and has not been indorsed to the securities intermediary or in blank, the other person is treated as holding

²⁰³ Reitz, C. R., Reflections on the Drafting of the 1994 Revision of Article 8 of the US Uniform Commercial Code, *Revue de droit uniforme – Uniform Law Review*, 2005-1/2, str. 368.

²⁰⁴ except as otherwise provided in Section 8-103,

²⁰⁵ § 8-102(a)(15) UCC

²⁰⁶ § 8-102(a)(14) UCC.

²⁰⁷ § 8-102(a)(9) UCC.

²⁰⁸ § 8-102(a)(17) UCC.

the financial asset directly rather than as having a security entitlement with respect to the financial asset²⁰⁹.

U.S. corporations can also have certificated²¹⁰ or uncertificated securities²¹¹ which, if in a registered form, obliges them to continuously evidence their shareholders or members in a list of shareholders or members, sometimes also called register of shareholders or member. This list or register should usually be stored at the place of the registered seat of the legal person. Such list or register should contain information on interest and its owners (shareholders / members) which allow for identification of the amount and the nature of the interest as well as its owners and, possibly, include all preceding shareholders or members in continuous timeline record without any gaps, although this may always not be the case.

C. Beneficial ownership and trust registers

i. Prospective beneficial ownership register

The establishment of register of beneficial owners is currently – in 2017 – discussed in the U.S. Congress in relation to a bill S. 1454 (the True Incorporation Transparency for Law Enforcement Act)²¹². Despite the lack of existence of register of beneficial owners in the U.S., the notion of beneficial owner under U.S. law²¹³ exists. The beneficial owner is defined in the following way:

(a) For the purposes of sections 13(d) and 13(g) of the Act²¹⁴ a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:

(1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or,

(2) Investment power which includes the power to dispose, or to direct the disposition of, such security.

(b) Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

(c) All securities of the same class beneficially owned by a person, regardless of the form which such beneficial ownership takes, shall be aggregated in calculating the number of shares beneficially owned by such person.

(d) Notwithstanding the provisions of paragraphs (a) and (c) of this rule: (1)

²⁰⁹ § 8-501 UCC.

²¹⁰ § 8-102(a)(16) UCC.

²¹¹ § 8-102(a)(18) UCC.

²¹² <https://www.congress.gov/bill/115th-congress/senate-bill/1454/text>

²¹³ § 240.13d-3.

²¹⁴ Corporate Transparency Act (H.R.3089/S.1717).

(i) A person shall be deemed to be the beneficial owner of a security, subject to the provisions of paragraph (b) of this rule, if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) (§ 240.13d-3(a)) within sixty days, including but not limited to any right to acquire: (A) Through the exercise of any option, warrant or right; (B) through the conversion of a security; (C) pursuant to the power to revoke a trust, discretionary account, or similar arrangement; or (D) pursuant to the automatic termination of a trust, discretionary account or similar arrangement; provided, however, any person who acquires a security or power specified in paragraphs (d)(1)(i)(A), (B) or (C), of this section, with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition shall be deemed to be the beneficial owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to such options, warrants, rights or conversion privileges shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such person but shall not be deemed to be outstanding for the purpose of computing the percentage of the class by any other person.

(ii) Paragraph (d)(1)(i) of this section remains applicable for the purpose of determining the obligation to file with respect to the underlying security even though the option, warrant, right or convertible security is of a class of equity security, as defined in § 240.13d-1(i), and may therefore give rise to a separate obligation to file.

(2) A member of a national securities exchange shall not be deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities and, pursuant to the rules of such exchange, may direct the vote of such securities, without instruction, on other than contested matters or matters that may affect substantially the rights or privileges of the holders of the securities to be voted, but is otherwise precluded by the rules of such exchange from voting without instruction.

(3) A person who in the ordinary course of his business is a pledgee of securities under a written pledge agreement shall not be deemed to be the beneficial owner of such pledged securities until the pledgee has taken all formal steps necessary which are required to declare a default and determines that the power to vote or to direct the vote or to dispose or to direct the disposition of such pledged securities will be exercised, provided, that:

(i) The pledgee agreement is bona fide and was not entered into with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with any transaction having such purpose or effect, including any transaction subject to Rule 13d-3(b);

(ii) The pledgee is a person specified in Rule 13d-1(b)(ii), including persons meeting the conditions set forth in paragraph (G) thereof; and

(iii) The pledgee agreement, prior to default, does not grant to the pledgee;

(A) The power to vote or to direct the vote of the pledged securities; or

(B) The power to dispose or direct the disposition of the pledged securities, other than the grant of such power(s) pursuant to a pledge agreement under which credit is extended subject

to regulation T (12 CFR 220.1 to 220.8) and in which the pledgee is a broker or dealer registered under section 15 of the act.

(4) A person engaged in business as an underwriter of securities who acquires securities through his participation in good faith in a firm commitment underwriting registered under the Securities Act of 1933 shall not be deemed to be the beneficial owner of such securities until the expiration of forty days after the date of such acquisition²¹⁵.

ii. Trusts and trust registers

Trusts may be established under the laws of U.S. states and U.S. trust company can exercise function of a trustee. U.S. based trusts must have some definite beneficiary – a person or class of persons whose identity can be determined. The persons' specific identities need not be known at the time the grantor creates the trust; it will be sufficient if the persons can be "readily ascertainable" within a certain time period. US-based trust can own membership interests of a US limited liability company (LLC) that owns the shares of an offshore holding company: the US trustee must comply with the non-US financial institution's request for common reporting standard self-certification The laws of states regarding trusts are codified into a Uniform Trust Code which is incorporated in more than a half of U.S. states²¹⁶.

iii. Beneficial owners – ultimate public organisations and other organisations

Apart from the Federal U.S. state who can own and owns shareholding interest in corporations, also individual states²¹⁷ and local municipalities can own shareholding interests.

²¹⁵ (Secs. 3(b), 13(d)(1), 13(d)(2), 13(d)(5), 13(d)(6), 14(d)(1), 23; [48 Stat. 882](#), 894, 895, 901; sec. 203(a), [49 Stat. 704](#), sec. 8, [49 Stat. 1379](#); sec. 10, [78 Stat. 88a](#); secs. 2, 3, [82 Stat. 454](#), 455; secs. 1, 2, 3-5, [84 Stat. 1497](#); secs. 3, 18, [89 Stat. 97](#), 155 ([15 U.S.C. 78c\(b\)](#), [78m\(d\)\(1\)](#), [89m\(d\)\(2\)](#), [78m\(d\)\(5\)](#), [78m\(d\)\(6\)](#), [78n\(d\)\(1\)](#), [78w](#)) [[43 FR 18495](#), Apr. 28, 1978, as amended at [43 FR 29768](#), July 11, 1978; [63 FR 2867](#), Jan. 16, 1998] <https://www.law.cornell.edu/cfr/text/17/240.13d-3>

²¹⁶ http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf

²¹⁷ Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming

1.2.3. Other third-states

The idea of ensuring greater transparency over beneficial ownership is relatively new. In accordance with the beneficial ownership policy adopted by the G-20 summit in Brisbane, Australia in 2014, the Financial Action Taskforce (FATF), and the European 4th Anti-Money Laundering Directive, most of the countries in the survey have recently amended their legislation (e.g., Argentina, Brazil, Costa Rica, France, Germany, Italy, Jamaica, Jordan, Pakistan, Singapore, South Africa, Sweden, United Kingdom) or are currently working on amending their laws (Afghanistan, India, Netherlands).

The term beneficial owner and the ownership and control structures first appeared at supranational level in the 2003 Revised Forty Recommendations²¹⁸ of the Financial Action Task Force.²¹⁹ Financial Action Task Force which exists as of 1989 represents a specialised international organisation in the area of prevention of money laundering and financing of terrorism, including ownership structures and beneficial owners.

The definition of beneficial owner was contained in the Glossary attached to these Recommendations and has stayed more or less unchanged up to now. The beneficial owner in the FATF context is defined as follows: "the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted". The definition also includes those persons who exercise ultimate effective control over a legal person or arrangement".²²⁰ However, the recommendations, as such, do not provide for a definition of the beneficial ownership interest or control and ownership structure.

In the FATF context, an indirect explanation of the meaning of the terms ownership and control structure and the beneficial ownership interest is currently given in the 2014 FATF Guidance on Transparency and Beneficial Ownership.²²¹ These guidelines clarify that the expressions "ultimately owns or controls" and "ultimate effective control" refer to situations in which ownership or control is exercised through a chain of ownership or by means of control other than direct control²²².

The process of identification and verification of the beneficial owner and ownership and control structure was described in an interpretative note to Recommendation 5.²²³ In the new version of FATF Recommendations of 2012²²⁴ the issue of beneficial ownership of legal persons and arrangements appeared in Recommendations 10 (on customer due diligence), 24

²¹⁸ Recommendations 5, 33 and 34.

²¹⁹ Financial Action Task Force is an intergovernmental organisation existing since 1989, with headquarters in Paris, specialised in the fight against money laundering.

²²⁰ FATF Glossary. Available at: <http://www.fatf-gafi.org/glossary/>

²²¹ The term beneficial owner is defined in chapters IV, and the terms beneficial ownership information are defined with respect to legal persons and legal arrangements in chapters V and VI respectively of the FATF Guidance on Transparency and Beneficial Ownership.

²²² FATF Guidance on Transparency and Beneficial Ownership, Box 1, 8.

²²³ Interpretative notes to the 2003 revised FATF Recommendations in W.C. Gilmore, 'Dirty Money – The evolution of international measures to counter money laundering and the financing of terrorism', (2012), 4th ed., Council of Europe Publishing, 305-307.

²²⁴ FATF Recommendations, adopted on 16 February 2012, and updated in February 2013, October 2015, June 2016 and October 2016.

(on beneficial ownership of legal persons) and 25 (on beneficial ownership of legal arrangements).

A latest report of the Law Library of U.S. Congress surveys the laws related to registration of beneficial owners and disclosure of information on corporate data in the European Union as a whole and in twenty-nine countries, representing all continents and major geographic regions of the world²²⁵.

According to this Report, the individual country entries identify institutions authorized to collect information on beneficial owners, procedures for submitting and updating this information, existing exemptions from disclosure, and requirements for the government to verify the information provided. They also indicate who has access to the corporate data provided to the authorities and how companies can be held liable for nondisclosure, for providing false information, or otherwise violating relevant legal requirements. All individual country entries include a definition of “beneficial owner” or comparable terms as provided by national legislation.

Countries whose laws address beneficial ownership regulate this issue through company laws, company registration rules, regulations implementing EU directives, or anti-money laundering legislation. They require that a company report information on beneficial owners to the registering authorities, which are usually state or local authorities. In some unitary states, this function is performed by a designated national institution. Information on corporate registration and beneficial owners is collected by business registrars (Afghanistan, Argentina, India, Sweden, United Kingdom), national tax authorities (Brazil), securities regulators (Australia, Pakistan), a securities exchange (South Africa), central banks (Armenia, Costa Rica), or local courts (France), or with regard to the EU, by a designated central registry in each Member State.

One major difference among the countries surveyed was in the definition of “beneficial owner.” The definition accepted by the EU and its Member States is based on FATF Guidance, which defines a beneficial owner as a “natural person who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted.” Other countries add to the definition individuals with a “relevant interest” (Australia) or a “person with significant control” (United Kingdom). These are individuals holding securities with the power to control the corporation and its transactions. In some cases, these individuals are defined based on specific percentages of shares they own (the lower threshold is usually between 20% and 30%). Japanese reporting requirements apply to all major shareholders.

While previously enacted legislation often does not address the issue of bearer shareholders or nominees, and treats beneficial owners as regular shareholders, newly proposed laws distinguish between a beneficial interest in a share and significant beneficial ownership (India), and contain a broad definition of “controlling beneficiary,” meaning an “individual or group of individuals who ultimately benefits from a good or service, or exercise(s) control over a company through ownership of securities, a pertinent contract or any other act, which allow them to impose, directly or indirectly, decisions on the shareholders or partners” (Mexico).

²²⁵ Disclosure of Beneficial Ownership, <https://www.loc.gov/law/help/beneficial-ownership/chart.php>

The study shows that even when the laws of a country do not contain transparency or beneficial ownership provisions, some countries may introduce special rules intended to prevent the use of corporate entities for unlawful purposes. To remedy this situation in Lebanon, the Governor of the Lebanese Central Bank prohibited dealings with corporate entities whose stocks and shares are totally or partially issued in bearer form.

Certain reporting requirements are provided for transactions involving “beneficiaries” in specific economic sectors (e.g., financial institutions (Israel, Pakistan), dealers in precious stones (Israel)), or for activities conducted by representatives of self-regulated professions (Israel). Exemptions from reporting requirements can be granted for individuals who own less than a particular percentage of company’s shares (Israel, Spain) and specific groups of individuals or companies working in select business sectors. The research indicated less strict beneficial owner identification rules for the travel industry and manual currency exchange activities in Portugal, and for public corporations in Sweden.

Access to the corporate data reported in registration documents is determined differently in each country. Some jurisdictions have created or are working on establishing open access to public registers of beneficial ownership (Afghanistan, Argentina, Australia, France, Israel, Jamaica, Netherlands, United Kingdom), although some may require the payment of fees (Australia, Jamaica, Netherlands). T

he EU Member States and Japan provide access to government institutions, obliged entities, and all who may have “legitimate interests” without defining the parameters of these interests. Others limit access to law enforcers (Singapore), monitoring government authorities (Armenia, Brazil, Costa Rica, Mexico), or members of the company (India).

It is broadly expected that companies will provide correct information to the authorities. While most of the laws surveyed contain general provisions stating that information on beneficial owners must be updated within a specific period after the legal requirement has been introduced (Sweden) and then regularly thereafter (Brazil, Costa Rica, Germany, France), or within a reasonable amount of time (Portugal, Sweden), or when a situation changes (Japan), other countries establish strict chronological limits for reporting, ranging from two days (Singapore) to five years (Italy).

Mexican law provides for monthly updates to be submitted by companies if they work in areas designated as vulnerable to money laundering. As a rule, governments do not verify information provided by companies and no data verification mechanisms are foreseen by national legislation. Verification requirements were only found in the laws of Argentina, France, Mexico, Namibia, South Africa, and Spain.

In the case of a failure to disclose beneficial owners, a court or the registering authority may issue an order to comply (Australia, France) and impose a fine. This may be a daily fine until the obligation to disclose is met (France, India) or a specific amount (Costa Rica, Japan, Spain, United Kingdom). In some cases, penalties can be in the form of de-registration (Namibia) or imprisonment (Pakistan, Portugal). Some countries (Armenia, Jordan) do not foresee any criminal or civil sanctions for failing to file accurate and timely information in the beneficial ownership registers. Their laws state that failing to provide correct information is punishable, but no penalties have been defined so far.

In general, the Report finds that most of the countries that have beneficial ownership registration laws in place view public beneficial ownership registration as an anti-money laundering tool that works in alignment with other legal mechanisms, such as access to company information, risk assessment, government monitoring, and law enforcement²²⁶.

²²⁶ Disclosure of Beneficial Ownership, <https://www.loc.gov/law/help/beneficial-ownership/chart.php>

2. Beneficial ownership and tax avoidance information and cooperation

2.1. Existing and prospective country-by-country reporting information

The fourth Capital Requirement Directive 2013/36/EU (the **4th CR Directive**) requires financial institutions that information on

- (i) profits made,
- (ii) taxes paid and
- (iii) subsidies received,

be published per-country in the annex to their annual financial statements or, where applicable, to the consolidated financial statements of the institution concerned as of 1st of January 2015²²⁷.

The Accounting Directive 2013/34/EU (the **Accounting Directive**) defines, inter alia, the structure of financial documents which have to be maintained and disclosed by companies. Annex V of this Directive which establishes the template for the profit and loss account stipulates that the profit and loss account shall contain, inter alia, the following information:

- (i) turnover,
- (ii) profits, and
- (iii) tax on profits.

Furthermore, the Accounting Directive requires the Commission to review the reporting regime under the Directive and consider whether it would be appropriate to include additional payment information such as effective tax rates and recipient details such as bank account information. Its Article 48, fourth sub-paragraph, as amended by Directive 2014/95/EU, refers to profits, tax on profit and public subsidies received as the minimum elements of the possible future EU country-by-country report template. By 21 July 2018 the Commission should produce a report on the practice of large companies in Member States in this area.

The Commission proposal amending the Accounting Directive by adding country-by-country reporting requirements for certain companies will make it visible whether such group of companies pay their fair share of corporate tax. However, a successful implementation of the countermeasures adopted to deal with these problems, namely beneficial ownership registers and CBCR disclosure requirements, requires a precise and practically applicable definition of notions of ownership and control structure (Art. 13 (1) (b) of the AML Directive)/beneficial ownership interest (Art. 30 (1) of the AML Directive)/group of companies (Accounting Directive), especially in situations of an indirect ownership as defined under Art. 3 (6) of the AML Directive, i.e. in cases where corporate ownership complex chains or webs of companies and legal persons.

²²⁷ Art. 89.

Proposed amendment to the Accounting Directive²²⁸ stipulates that Member States shall require ultimate parent undertakings governed by their national laws and having a consolidated net turnover exceeding EUR 750 000 000 as well as undertakings governed by their national laws that are not affiliated undertakings and having a net turnover exceeding EUR 750 000 000 to draw up and publish a report on income tax information on an annual basis. The report on income tax information shall be made accessible to the public on the website of the undertaking on the date of its publication²²⁹. The report on income tax information shall include information relating to all the activities of the undertaking and the ultimate parent undertaking, including activities of all affiliated undertakings consolidated in the financial statement in respect of the relevant financial year.

This information shall comprise

- (a) a brief description of the nature of the activities;
- (b) the number of employees;
- (c) the amount of the net turnover, which includes the turnover made with related parties;
- (d) the amount of profit or loss before income tax;
- (e) the amount of income tax accrued (current year) which is the current tax expense recognised on taxable profits or losses of the financial year by undertakings and branches resident for tax purposes in the relevant tax jurisdiction²³⁰;
- (f) the amount of income tax paid which is the amount of income tax paid during the relevant financial year by undertakings and branches resident for tax purposes in the relevant tax jurisdiction; and
- (g) the amount of accumulated earnings²³¹.

The aforementioned amendment was partially voted in the first reading by the European Parliament on 4 July 2017. As a result, European Commission proposal as amended by the European Parliament was approved and this amended proposal is now the base for interinstitutional negotiations with the Council²³².

This features OECD Model legislation on Country-by-Country Reporting

Article 1 *Definitions*

For purpose of [title of the law] the following terms have the following meanings:

²²⁸ Directive amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (COM(2016) 198 final).

²²⁹ Art. 48b (1).

²³⁰ The current tax expense shall relate only to the activities of an undertaking in the current financial year and shall not include deferred taxes or provisions for uncertain tax liabilities.

²³¹ Art. 48c.

²³² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2016%3A198%3AFIN>

1. *The term “Group” means a collection of enterprises related through ownership or control such that it is either required to prepare Consolidated Financial Statements for financial reporting purposes under applicable accounting principles or would be so required if equity interests in any of the enterprises were traded on a public securities exchange.*
2. *The term “MNE Group” means any Group that (i) includes two or more enterprises the tax residence for which is in different jurisdictions, or includes an enterprise that is resident for tax purposes in one jurisdictions and is subject to tax with respect to the business carried out through a permanent establishment in another jurisdiction, and (ii) is not an Excluded MNE Group.*

Article 4

Country – by – Country Report

1. *For purposes of this [title of the law], a Country – by – Country Report with respect to an MNE Group is report containing:*
 - (i) *Aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash equivalents with regard to each jurisdiction in which the MNE Group operates;*
 - (ii) *An identification of each Constituent Entity of MNE Group settings out the jurisdiction of tax residence of such Constituent Entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such Constituent Entity is organised, and the nature of the main business activity or activities of such Constituent Entity.*
2. *The Country – by Country Report shall be filed in a form identical to and applying the definitions and instructions contained in the standard template set out at [Annex III of Chapter V of the OECD Transfer Pricing Guidelines as the same may be modified from time to time] / [Annex III of the Report Transfer Pricing Documentation and Country – by Country Reporting on Action 13 of the OECD/G20 Action Plan on Base Erosion and Profit Shifting] / [the Appendix to this law].*

2.2. Access to beneficial ownership information by tax authorities

In international tax law, mechanisms of cooperation between different jurisdictions are regulated, in particular, by multilateral Convention on Mutual Administrative Assistance in Tax Matters. (Strasbourg Convention), by double taxation treaties and by Tax Information Exchange Agreements (TIEA).

At the EU level, Council conclusions on tax transparency of 11 October 2016 invited the Commission under point 10 to analyse the possibility for a proposal on improving the cross-border access to information on ultimate beneficial owners based on the ongoing work at international level. In particular, these conclusions require to:

- *consider the proposals by the Commission for revision of the Directive on Administrative Cooperation and of the Anti-Money Laundering Directive in view of the synergies between these two areas as timely and INTENDS to work towards their swift adoption in accordance with the EU legislative process;*
- *confirm that there is a need for more effective and efficient cooperation between tax authorities and other agencies involved in the fight against tax evasion, money laundering and terrorist financing in line with the appropriate legal safeguards;*
- *stress the need to prevent the large-scale concealment of funds which hinders the effective fight against tax evasion, money laundering and terrorist financing, and to ensure that the identities of beneficial owners of companies, legal entities or legal arrangements are known;*
- *welcome the initiative for the automatic exchange of information on ultimate beneficial owners whereby many jurisdictions, including all Member States, have agreed to exchange information on the beneficial owners of companies, legal entities and legal arrangements and look forward to rapid international progress;*
- *invite the Commission to analyse the possibility for a proposal on improving the cross-border access to information on ultimate beneficial owners on the basis of the ongoing work at international level;*
- *note that at its October 2016 meeting the G20 heard initial proposals by OECD and FATF on ways to improve the implementation of the international standards on transparency, including on the availability of beneficial ownership information;*
- *note the intention of the Commission to explore possibilities for Mandatory Disclosure Rules inspired by Action 12 of the OECD BEPS project, drawing on the experiences in this area of some EU Member States, and to possibly come forward with a legislative proposal in 2017;*
- *encourage the Commission to start reflecting on the possibility for future exchange of such information between tax administrations in the EU;*
- *stress the need to work closely with the OECD and other international partners on a possible global approach to greater transparency in this area;*
- *support the promotion of higher tax good governance standards worldwide and note that technical work in the Council has already started within the Code of Conduct on Business Taxation Group on establishing an EU list of non-cooperative third country jurisdictions to be ready in 2017, including on defining the criteria for listing jurisdictions and on exploring possible countermeasures²³³.*

The EU list of non-cooperative jurisdictions was published on 15 December 2017²³⁴.

The OECD/G20 Action 12 recommended that countries introduce a regime for the mandatory disclosure of aggressive tax planning arrangements but does not define any minimum

²³³ <http://www.consilium.europa.eu/en/press/press-releases/2016/10/11/ecofin-conclusions-tax-transparency/>

²³⁴ https://ec.europa.eu/taxation_customs/sites/taxation/files/eu_list_factsheet_en.pdf

standard to comply with. The final report on Action 12 was published as part of the set of BEPS actions in October 2015. Some Member States invited the Commission to consider initiatives on mandatory disclosure rules inspired by the OECD/G20 Base Erosion and Profit Shifting (BEPS) Action 12⁵, with regard to introducing more effective disincentives for intermediaries who assist in tax evasion schemes. The ECOFIN invited “the Commission to consider legislative initiatives on Mandatory Disclosure Rules inspired by BEPS Action 12 of the OECD project in order to introduce more effective disincentives for intermediaries who assist in tax evasion or avoidance schemes”.

In this context a number of measures to fight against tax avoidance which often involves hiding of corporate ownership structures and beneficial owners have recently been adopted: Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (DAC): the Directive provides for the mandatory automatic exchange of information, where the information is available, in respect of five non-financial categories of income and capital, with effect from 1 January 2015: income from employment, director's fees, life insurance products not covered by other Directives, pensions, and ownership of and income from immovable property;

- Council Directive 2014/107/EU of 16 December 2014¹² as regards the automatic exchange of financial account information between Member States based on the OECD Common Reporting Standard (CRS) which prescribes the automatic exchange of information on financial accounts held by non-residents;
- Council Directive (EU) 2015/2376 of 8 December 2015¹³ as regards the mandatory automatic exchange of information on advance cross-border tax rulings;
- Council Directive (EU) 2016/881 of 25 May 2016¹⁴ as regards the mandatory automatic exchange of information on country-by-country reporting (CbCR) amongst tax authorities.
- Agreements between Member States and third countries¹⁶ regarding the automatic exchange of financial account information based on the OECD Common Reporting Standard (CRS).

Moreover, recently the Commission made

- a proposal for a Directive 2016/0107 of the European Parliament and of the Council of 12 April 2016¹⁵ on the disclosure of income tax information of certain undertakings and branches provides for the publication of income tax information which would give the wider public access to tax-relevant data of multinational enterprises on a country-by-country basis,
- a proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements²³⁵.

This latter amendment deals in its Annex IV so-called hallmarks which allow to ascertain whether an arrangement or of a series of arrangements is to obtain a tax advantage if it can be established that the advantage is the outcome which one may expect to derive from such an arrangement, or series of arrangements, including through taking advantage of the specific way that the arrangement or series of arrangements are structured.

²³⁵ COM(2017) 335 final

One of the specific hallmarks concerning automatic exchange of information agreements in the Union, namely an arrangement or series of arrangements which circumvent Union legislation or agreements on the automatic exchange of information, including agreements with third countries, and that have the effect of avoiding the reporting of income to the State of tax residence of the taxpayer, include the use of jurisdictions with inadequate or weak regimes of enforcement of anti-money laundering legislation. This includes where there are a lack of rules for identifying the beneficial ownership of legal entities, including trusts, foundations and special purpose vehicles or where there is a use of nominees or powers of attorney to conceal the identity of the beneficial owner²³⁶. These two proposals are still a proposal under discussion before the Parliament and Council in accordance with the ordinary procedure.

Nonetheless, it has to be taken into account that existing aforementioned tax instruments at EU level do not contain explicit provisions requiring Member States to exchange information in the case of tax avoidance and/or evasion schemes that come to their attention. The DAC contains a general obligation for the national tax authorities to spontaneously communicate information to the other tax authorities within the EU in certain circumstances. This includes the loss of tax in a Member State or tax savings resulting from artificial transfers of profits within groups of companies.

The resolution of the European Parliament on Corporate Tax Avoidance Report dated 16 December 2015 recommended to the European Commission ban companies engaged in aggressive tax planning through tax havens from accessing public funds and contracts both on the EU and Member State level.

Companies which use tax havens in order to put in place aggressive tax planning schemes and therefore do not comply with Union tax good governance standards should be subject to the counter measures which should include a ban:

- on accessing state aid or public procurement opportunities at Union or national level;
- being banned from accessing certain Union funds, in particular funding provided by the European Investment Bank, European Bank for Reconstruction and Development, European Fund for Strategic Investment, funds provided under the Common Agricultural Policy, the five European Structural and Investment Funds.

In 2016, the European Commission issued a proposal for a Regulation on the financial rules applicable to the general budget of the Union²³⁷ (COM(2016)0605 – C8-0372/2016 – 2016/0282(COD)). One of its key provisions, namely Art. 132 defines exclusion criteria for recipients of public contracts and grants financed from the budget of EU institutions. On the basis of the work leading to the elaboration of this Comparative study and the Handbook, the following amendment aiming at disclosure of corporate ownership structures up to the

²³⁶ Section D of the Annex to the Commission proposal

²³⁷ Amending Regulation (EC) No 1212/2002, Regulations (EU) No 1296/2013, (EU) 1301/2013, (EU) No 1303/2013, EU No 1304/2013, (EU) No 1305/2013, (EU) No 1306/2013, (EU) No 1307/2013, (EU) No 1308/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, (EU) No 652/2014 of the European Parliament and of the Council and Decision No 541/2014/EU of the European Parliament and of the Council.

beneficial owner(s) of the aforementioned recipients was proposed to MEP Ingeborg Graessle and tabled by her²³⁸.

Amendment 546

Ingeborg Gräßle, Richard Ashworth

Proposal for a regulation

Article 132 – paragraph 4 – point a

Text proposed by the Commission

(a) a natural or legal person who is a member of the administrative, management or supervisory body of the et person or entity referred to in Article 131(1), or who has powers of representation, decision or control with regard to these persons or entities is in one or more of the situations referred to in points (c) to (f) of paragraph 1;

Amendment

(a) a natural or legal person who is a member of the administrative, management or supervisory body of the et person or entity referred to in Article 131(1), or who has powers of representation, decision or control with regard to these persons or entities, **including persons and entities within the ownership and control structure and beneficial owners**, is in one or more of the situations referred to in points (c) to (f) of paragraph 1;

Article 132

Exclusion criteria and administrative sanctions

1. The authorising officer responsible shall exclude a person or entity referred to in Article 131(1) from participating in award procedures governed by this Regulation or from being selected for implementing Union funds where:

(a) the person or entity is bankrupt, subject to insolvency or winding-up procedures, where its assets are being administered by a liquidator or by a court, where it is in an arrangement with creditors, where its business activities are suspended, or where it is in any analogous situation arising from a similar procedure provided for under EU or national laws or regulations;

(b) it has been established by a final judgment or a final administrative decision that the person or entity is in breach of its obligations relating to the payment of taxes or social security contributions in accordance with the applicable law;

(c) it has been established by a final judgment or a final administrative decision that the person or entity is guilty of grave professional misconduct by having violated applicable laws or regulations or ethical standards of the profession to which the person or entity belongs, or by having engaged in any wrongful conduct which has an impact on its professional

²³⁸ As to the end of 2017, this amendment was still under discussion.

credibility where such conduct denotes wrongful intent or gross negligence, including, in particular, any of the following:

(i) fraudulently or negligently misrepresenting information required for the verification of the absence of grounds for exclusion or the fulfillment of eligibility or selection criteria or in the performance of the legal commitment;

(ii) entering into agreement with other persons or entities with the aim of distorting competition;

(iii) violating intellectual property rights;

(iv) attempting to influence the decision-making of the authorising officer responsible during the award procedure;

(v) attempting to obtain confidential information that may confer upon it undue advantages in the award procedure;

(d) it has been established by a final judgment that the person or entity is guilty of any of the following:

(i) fraud, within the meaning of Article 1 of the Convention on the protection of the European Communities' financial interests, drawn up by the Council Act of 26 July 1995;

(ii) corruption, as defined in Article 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, drawn up by the Council Act of 26 May 1997 , and in Article 2(1) of Council Framework Decision 2003/568/JHA , as well as corruption as defined in the applicable law;

(iii) participation in a criminal organisation, as defined in Article 2 of Council Framework Decision 2008/841/JHA ;

(iv) money laundering or terrorist financing, as defined in Article 1 of Directive 2005/60/EC of the European Parliament and of the Council;

(v) terrorist-related offences or offences linked to terrorist activities, as defined in Articles 1 and 3 of Council Framework Decision 2002/475/JHA, respectively, or inciting, aiding, abetting or attempting to commit such offences, as referred to in Article 4 of that Decision;

(vi) child labour or other forms of trafficking in human beings as defined in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council;

(e) the person or entity has shown significant deficiencies in complying with main obligations in the performance of a legal commitment financed by the budget;

(f) it has been established by a final judgment or final administrative decision that the person or entity has committed an irregularity within the meaning of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95.

2. In the absence of a final judgment or, where applicable, a final administrative decision in the cases referred to in points (c), (d) and (f) of paragraph 1, or in the case referred to in point (e) of paragraph 1, the authorising officer responsible shall exclude a person or entity referred to in Article 131(1) on the basis of a preliminary classification in law of a conduct referred to in those points, having regard to established facts or other findings contained in the recommendation of the panel referred to in Article 139.

The preliminary classification referred to in the first subparagraph does not prejudice the assessment of the conduct of the person or entity referred to in Article 131(1) concerned by the competent authorities of the Member States under national law. The authorising officer responsible shall review its decision to exclude the person or entity referred to in Article 131(1) and/or to impose a financial penalty on a recipient without delay following the notification of a final judgment or a final administrative decision. In cases where the final judgment or the final administrative decision does not set the duration of the exclusion, the authorising officer responsible shall set this duration on the basis of established facts and findings and having regard to the recommendation of the panel referred to in Article 139.

Where such final judgment or final administrative decision holds that the person or entity referred to in Article 131(1) is not guilty of the conduct subject to a preliminary classification in law, on the basis of which it has been excluded, the authorising officer responsible shall, without delay, bring an end to that exclusion and/or reimburse, as appropriate, any financial penalty imposed.

The facts and findings referred to in the first subparagraph shall include, in particular:

(a) facts established in the context of audits or investigations carried out by the Court of Auditors, European Anti-Fraud Office or internal audit, or any other check, audit or control performed under the responsibility of the authorising officer;

(b) non-final administrative decisions which may include disciplinary measures taken by the competent supervisory body responsible for the verification of the application of standards of professional ethics;

(c) decisions of entities and persons implementing Union funds pursuant to point (c) of Article 61(1) or of entities implementing the budget pursuant to Article 62;

(d) decisions of the Commission relating to the infringement of the Union's competition rules or of a national competent authority relating to the infringement of Union or national competition law.

3. Any decision of the authorising officer responsible taken under Articles 131 to 138 or, where applicable, any recommendation of the panel referred to in Article 139, shall be made in compliance with the principle of proportionality, in particular taking into account:

(a) the seriousness of the situation, including the impact on the Union's financial interests and image;

(b) the time which has elapsed since the relevant conduct;

(c) its duration and its recurrence;

(d) the intention or degree of negligence;

(e) the limited amount at stake for point (b) of paragraph 1 of this Article;

(f) any other mitigating circumstances, such as the degree of collaboration of the person or entity referred to in Article 131(1) concerned with the relevant competent authority and its contribution to the investigation as recognised by the authorising officer responsible, or the disclosure of the exclusion situation by means of the declaration referred to in Article 133(1).

4. The authorising officer responsible shall exclude the person or entity referred to in Article 131(1) where:

(a) a natural or legal person who is a member of the administrative, management or supervisory body of the person or entity referred to in Article 131(1), or who has powers of representation, decision or control with regard to these persons or entities is in one or more of the situations referred to in points (c) to (f) of paragraph 1;

(b) a natural or legal person that assumes unlimited liability for the debts of that person or entity referred to in Article 131(1) is in one or more of the situations referred to in point (a) or (b) of paragraph 1;

(c) a natural person who is essential for the award or for the implementation of the legal commitment and is in one or more of the situations referred to in point (c) to (f) of paragraph 1.

5. In the cases referred to in paragraph 2 of this Article, the authorising officer responsible may exclude a person or entity referred to in Article 131(1) provisionally without the prior recommendation of the panel referred to in Article 139, where their participation in an award procedure or their selection for implementing Union funds would constitute a serious and imminent threat to the Union's financial interests. In such cases, the authorising officer responsible shall immediately refer the case to the panel and shall take a final decision no later than 14 days after having received the recommendation of the panel.

6. The authorising officer responsible, having regard, where applicable, to the recommendation of the panel referred to in Article 139, shall not exclude a person or entity referred to in Article 131(1) from participating in an award procedure and from being selecting to implement Union funds where:

(a) the person or entity has taken remedial measures specified in paragraph 7, to an extent that is sufficient to demonstrate its reliability. This point shall not apply in the case referred to in point (d) of paragraph 1 of this Article;

(b) it is indispensable to ensure the continuity of service, for a limited duration and pending the adoption of remedial measures specified in paragraph 7;

(c) such an exclusion would be disproportionate on the basis of the criteria referred to in paragraph 3 of this Article.

In addition, point (a) of paragraph 1 of this Article shall not apply in the case of the purchase of supplies on particularly advantageous terms from either a supplier which is definitively

winding up its business activities or the liquidators in an insolvency procedure, an arrangement with creditors, or a similar procedure under EU or national laws or regulations.

In the cases of non-exclusion referred to in the first and second subparagraphs of this paragraph, the authorising officer responsible shall specify the reasons for not excluding the person or entity referred to in Article 131(1) and inform the panel referred to in Article 139 of those reasons.

7. The measures referred to in paragraph 6, which remedy the exclusion situation may include, in particular:

(a) measures to identify the origin of the situations giving rise to exclusion and concrete technical, organisational and personnel measures within the relevant business or activity area of the person or entity referred to in Article 131(1), appropriate to correct the conduct and prevent its further occurrence;

(b) proof that the person or entity referred to in Article 131(1) has undertaken measures to compensate or redress the damage or harm caused to the Union's financial interests by the underlying facts giving rise to the exclusion situation;

(c) proof that the person or entity referred to in Article 131(1) has paid or secured the payment of any fine imposed by the competent authority or of any taxes or social security contributions referred to in point (b) of paragraph 1.

8. The authorising officer responsible, having regard, where applicable, to the revised recommendation of the panel referred to in Article 139, shall, without delay, revise its decision to exclude a person or entity referred to in Article 131(1) ex officio or on request from that person or entity, where the latter has taken remedial measures sufficient to demonstrate its reliability or has provided new elements demonstrating that the exclusion situation referred to in paragraph 1 of this Article no longer exists.

3. Concluding Recommendations: How could beneficial ownership disclosure and evidencing guidelines look like?

In a situation where within EU law there is no guidance which could provide content to the definitions of beneficial ownership interest, control and ownership structure or persons with (direct or indirect) control or provisions which could describe the process of identification and evidencing of ownership structure of a legal person, this shortcoming can be to certain extent remedied by provisions employed in the recommendations of the intergovernmental organisation Financial Action Task Force, in particular Recommendations 24²³⁹ and 25²⁴⁰ and the FATF Guide - Transparency and Beneficial Ownership²⁴¹. Although the FATF guidance on transparency of beneficial ownership interpreting FATF Recommendations 24 and 25 is a solid basis for the desired converging interpretation of the existing general legal notions in the area of disclosure and evidencing of ownership structures and beneficial owners, it is still not detailed enough to serve as a practical step-by-step guide either for legal persons or responsible authorities in this context.

This step-by-step guide providing guidance on the key definitions and the process of identification and evidencing of beneficial ownership interest is provided by the Practical Guide on disclosure and evidencing of corporate and control structures and beneficial owner(s) (the Practical Guide)²⁴² developed by Czech non-governmental organisations. This Practical Guide is largely inspired by the aforementioned FATF Recommendations and Guidelines. It is, however, more specific than the FATF documents, practically applicable both for public authorities and legal persons and usable for all types of ownership structures irrespective of the jurisdiction to which these structures could lead to.

This Practical Guide is different from the Handbook for disclosure of beneficial ownership since it concerns verification of already disclosed corporate ownership structures whereas the Handbook concerns investigation of non-disclosed ownership structure and beneficial ownership. Although similar to the process of investigation, the process of verification by public authorities or financial institutions and other designated non-financial bodies and professions of already disclosed ownership structures and beneficial owner(s), differs in certain important aspects from the investigative process. Therefore, for verification of accuracy and credibility of submitted ownership structure and beneficial owner(s) it is more appropriate to use the Practical Guide for verification of disclosed ownership structure and beneficial owner(s)²⁴³.

The Practical Guide is divided in four parts: after the definitions of the main terms in the first part, the second part lays down the contents of the declaration on corporate ownership structure and beneficial owners while the third part sets out the requirements for evidencing documents by which the information on legal persons and other entities and ownership interest can be proven. The last part adds rules on updating the disclosed and evidenced ownership structures.

The Practical Guide satisfies the need for a converging guidance of the terms relating to ownership structure disclosure found in the aforementioned different pieces of EU legislation,

²³⁹ Recommendation 24 –Transparency and beneficial ownership of legal persons.

²⁴⁰ Recommendation 25 –Transparency and beneficial ownership of legal arrangements.

²⁴¹ FATF Guidance, Transparency and Beneficial Ownership, FATF, October 2014.

²⁴² Transparency International Czech Republic and Lexperanto: www.transparencyid.com

²⁴³ Available at www.transparencyid.com.

such as the Directive 2015/849, Directive 2014/24, Regulations 966/2012 and 1268/2012 or Regulation 2001/2580.²⁴⁴ A common interpretation of terms relating to beneficial ownership identification contained in these instruments can be provided thanks to the partly overlapping purpose of these instruments which is to prevent that neither private nor public funds fuel organised crime, support misuse of taxpayers' money or finance activities of belligerent states and organisations.

The Practical Guide provides definitions of ownership structure, interest (direct and indirect), control and controlling persons. The identification of the corporate ownership and control structure is done via a declaration on corporate ownership structure and beneficial owner. The aim of this declaration is to establish which information and evidence should be required from each person within the control and ownership structure. The ownership structure is composed of two elements: legal persons and other arrangements on the one hand – grouped under a common term corporate subjects - and ownership interest on the other hand. Corporate subjects in the ownership structure can be either business corporations, such as limited liability companies, non-profit legal persons, such as associations or foundations, or trust-like or fund-like structures, such as trusts or funds.

A beneficial owner may be either a natural person or an ultimate public organisation. The ultimate public organisation is a public law entity, such as an international organisation, state, regional, municipal, local organisation or other self-regulatory body, in which no other legal entity or arrangement has a interest or other relevant interest. The ultimate public organisation may be an international organisation, state, territorial administrative unit, professional chamber, e.g. bar association, or autonomous public institution, e.g. university.

Identification of corporate subjects in the ownership structure and beneficial owners is not sufficient. Neither the obliged entities nor public registers of beneficial owners under Directive 2015/849 can content themselves with mere declarations of honour on who the beneficial owners are and what the nature and extent of their direct or indirect beneficial interest is. The requirement of evidencing of ownership structure and beneficial owners results from Art. 30 (4) of Directive 2015/849 which prescribes that the information about beneficial owners and their interests held in central register have to be adequate, accurate and current; its recital 14 stipulates that Member States may decide that obliged entities are responsible for filling in the register, the disclosure of the nature and extent of direct and indirect beneficial interest of beneficial owners will have to be evidenced.

If any guidance on disclosure of corporate structure and beneficial owners is to have any value, it has to specify by which documents the information on ownership structure, including the evidence of entities within this structure and interests, and beneficial owners, should be evidenced. The existence of a legal person, including the information about its name, registration number, address and its management or supervisory body, can always be proven by an excerpt from a public registry. No legal person can exist without being registered in a public registry. The interest in legal persons, which laws of most countries qualify as an ownership interest²⁴⁵ or a membership right,²⁴⁶ is in almost all countries evidenced by a paper document or an electronic record. An ownership interest in a legal person can be evidenced

²⁴⁴ Arts. 13 (1) (b), (d) and Art. 30 (1), (2) and (4) Directive 2015/849; Art. 51 (1) Directive 2014/24; Art. 106 (4) and (10) and Art. 143 (2) Regulation 966/2012 and 1268/2012; Art. 1 (5) and (6) Regulation 2001/2580.

²⁴⁵ Corporate entities and other arrangements.

²⁴⁶ In non-profit legal persons.

above all by a record from a public registry; however, depending on the type of a legal person such evidence of ownership interest may not always be available.

If the information about an interest is not available in a record from a public registry, an interest in a company can be proven by its shares: if a company has book-entry shares, then the share will be proven by a record from the securities account by the holder of the account who, at the same time, will be owner of the share. By contrast, if a company has registered paper shares, then to evidence the shareholder interest, the list of shareholders accompanied by a copy of the share certificate and a declaration of honour that these copies reflect the originals should be delivered; when a company has paper bearer shares, where the ownership cannot be easily determined, it should put these shares into an irreversible deposit, a de facto immobilisation of such shares since otherwise their owner will not be identifiable. The owner and the ownership of bearer paper shares in irreversible deposit will then be proven by the confirmation from a bank about the fact that these shares were put into such deposit.

Regarding non-profit legal persons, the membership interest therein, or more precisely the membership, will be proven either by a memorandum of association or a list of members. In respect of trust-like or fund-like arrangement the evidence about the interest in such an arrangement will be proven by a notarial deed establishing such arrangement and a copy of the list of beneficiaries.

In the context of evidencing interest in legal persons and other arrangements, the difficulty may appear in situations where it will be necessary to evidence an interest in a legal person or trust-like or fund-like arrangements which will be incorporated outside the European Union should be evidenced. Therefore, in case of documents issued by non-public entities, that is by a non-EU legal person in the ownership structure or by a non-EU custodian or a bank, additional documents should be required: from the non-EU legal person the Practical Guide requires in addition (i) a declaration on confidentiality waiver regarding the relevant securities account or deposit of paper bearer shares, and (ii) an authorisation to obtain information regarding securities account or deposit with the bank which issued the relevant evidencing document. Furthermore, from a non-EU share account custodian or a depository which issued such evidencing document, an undertaking of cooperation with authorities of EU Member States signed by the authorised bank officer should be required in order to make the verification of the evidencing documents submitted by the EU legal person in respect of legal persons and interest within its ownership structure but outside the EU possible.

The last issue which needs to be solved is how to verify whether the beneficial owner who is a natural person is the true or ultimate beneficial owner or whether he or she is only a formal legal beneficial owner who in reality acts on behalf of some other person. If the identified and evidenced ultimate owner is the beneficial owner it should be indicated – in the above-mentioned declaration identifying beneficial owner – whether the ultimate and beneficial owner is a lawyer or a professional nominee. This indication would help trace possible fraud since the situation when the declared ultimate beneficial owner is a lawyer or professional nominee could indicate that the declared ultimate beneficial owner may be acting on behalf of another person: the actual verification of this fact could, however, not be made within the identification and evidencing process but on a case-by-case basis by authorities of Member States in case of fraud suspicion which would give right to public authorities to lift the lawyer's secrecy. Nevertheless, such a declaration would at least expose the possibly fraudulent lawyer or professional nominee to a violation of ethical rules. Under the other option, with respect to the ultimate formal owner who would be acting on behalf of another person – the beneficial owner – it should be indicated in the aforementioned declaration that

such ultimate formal (legal) owner is not a beneficial owner, and at the same time, this beneficial owner should be identified together with the identification a contract of representation, power of attorney or other document on the basis of which the ultimate legal owner is acting on behalf of ultimate beneficial owner. This process should be repeated should the indicated beneficial owner be in reality also only a representative acting on behalf of a further person until the moment when the true beneficial owner would be reached.

Requiring disclosure and evidencing of the ownership structure of legal persons would make little sense if these structures were not regularly updated. Both the ownership structures and beneficial owners can change the next moment after the disclosure has been done. Should the disclosed information about ownership structures and beneficial owners correspond to the reality, they must be updated in a way that they reflect the reality, but at the same time this updating must not be too cumbersome for the legal persons concerned.

Any useful guidance on beneficial ownership disclosure and evidencing must therefore resolve the issue of updating of disclosed ownership structures and beneficial owner(s). The updating has to deal with two situations: first, with a situation when in a certain period no changes in ownership structure took place, and second, with a reverse situation when one or more changes in ownership structures occurred in such period. An effective and at the same time efficient solution of these situations requires a differentiated approach: for situations where no changes occurred less evidence is necessary than for situations where changes did take place. In concrete terms, where during the past calendar quarter, there is a change in ownership of the interest in the corporate subject, then the declaration and evidencing documents should be updated at the end of this calendar quarter. If there are more subsequent changes in the calendar quarter, all these changes should be registered at once at the end of the calendar quarter in question. This means that at a maximum the ownership structure will have to be updated four times a year. If during the calendar year no change in the ownership structure happened, the legal person should confirm this fact and provide up-to-date ownership documents to prove it.

The guidance should provide for exemptions from the disclosure and evidencing obligations. In principle, two exemptions can be foreseen. The first one relates to interests acquired on regulated market and multilateral trading facilities subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information, as set out in the definition of the beneficial owner under Directive 2015/849.²⁴⁷ The second one is not laid down directly in any legal regulation but results from the EU as well as national prudential rules governing the licensing of financial and credit institutions, insurance companies financial intermediaries, investment and pension funds etc. The ownership structures and beneficial owners not only have to be identified, but are also subject to approval of the relevant regulatory bodies as far as the origin of their initial capital and the credibility of controlling persons is concerned, including their changes.

Last but not least, in respect of identification of more complex structures involving chains of interest holdings, a number of additional more detailed technical issues have to be dealt with: for instance, how persons with controlling interest should be determined, how to identify shareholders acting in concert²⁴⁸ or how circumvention of disclosure and evidencing rules by

²⁴⁷ Art. 3 (6) Dir 2015/849.

²⁴⁸ Moreover, in another example, as the definition of indirect ownership suggests there can be more than one controlling owner with 25% + 1 share interest, for example, if two 30 % interest owners act jointly and they can

collateral holders which may effectively control voting rights in a legal person via collateral agreements should be prevented.

A lack of interpretation of the notions of beneficial ownership interest, ownership and control structure or person with control as well as of the process of disclosure and evidencing of these structures and persons hampers the effectiveness of fighting terrorist financing, corruption in granting of public contracts and subsidies and international sanctions, but also generates unnecessary administrative burden for legal persons concerned. This lack of effectiveness of the beneficial owner disclosure due to the non-existing common EU interpretation of the notion corporate and control structure was demonstrated in the Panama Papers scandal²⁴⁹. It is therefore understandable that there is a rising pressure from the political level to make sure that registers of beneficial owners contain granular, reliable and up-to date information on beneficial owners and their interests in legal persons.

However, despite this strong political pressure on the creation of registers of beneficial owners which would contain high quality information on beneficial owners and their interests in legal persons which would be easily and widely accessible, the identification and evidencing of ownership structures of legal persons encounters in practice potentially significant difficulties. Clearly, a common EU interpretation guide on what the beneficial ownership interest, corporate and control structure or person with control mean and how should the ownership structure should be disclosed and evidenced would significantly help significantly in the fight against financing of organised crime and terrorism, corruption, conflict of interest and enforcement of international sanctions.

The desired interpretation guidance in this respect has so far been developed only by non-governmental organisations. Their interpretation guidance contained in the Practical Guide on disclosure and evidencing of corporate and control structures and beneficial owner(s) could, on the one hand, fill in the aforementioned interpretation gap and remedy the described problems; on the other hand, this interpretation guidance could help banks and other non-financial bodies and professions to duly fulfill their duty to identify the corporate ownership and managing control of a client and his beneficial owners under the respective antimoney laundering rules.

The Practical Guide could also help the registry courts not only to verify whether the declared beneficial owner of a legal is indeed the beneficial owner but also to check the amount and extent of his beneficial interest. At the same time, this guide could help public bodies to verify ownership structures until beneficial owners of participants in public procurement tenders and applicants for EU fund providers. This interpretation guidance prepared by NGOs could be turned into an EU legislative proposal foreseen under Directive 2015/849²⁵⁰ which may be presented until 26 June 2019 by the European Commission together with the Report on

outvote the third owner with the highest nominally 40 % interest. in a way that the combined interest of the latter would trump the 40 % shareholder.

²⁴⁹ O. Skalková, 'Jedině v české eBance umíme otevřít účet bez uvedení reálného vlastníka, pochvaloval si advokát Mossack Fonseky', 4 April 2016, informační server iHNED, available at: <http://byznys.ihted.cz/c1-65233650-jedine-v-ceske-ebance-umime-otevrit-ucet-bez-uvedeni-realneho-vlastnika-pochvaloval-si-advokat-mossack-fonseka>; O. Skalková, 'Panamské dokumenty ukázaly na eBanku. Otevřou účet bez reálného vlastníka, psal právník', 4 April 2016, informační server Aktuálně, available at: <https://zpravy.aktualne.cz/ekonomika/panamske-dokumenty-ukazaly-na-ebanku/r~7f13e4acfa6d11e5b61c002590604f2e/>

²⁵⁰ Art. 30 (10) and Art. 31 (19) Dir 2015/849.

assessing the conditions and the technical specifications and procedures for ensuring safe and efficient interconnection of the central registers.

If the aforesaid EU-wide guidance on beneficial ownership was also accompanied by a single EU-wide certification mechanism which would attest that the disclosure and evidencing of ownership structure and beneficial owners was performed in accordance with such guidance, it would alleviate the administrative burden on legal persons required to register their beneficial ownership interest and beneficial owners. At the same time, it would reduce the administrative burden resulting from the obligation to verify those beneficial owners and ownership structures imposed on financial institutions and other designated non-financial bodies and professions as well as public authorities having the same obligations with respect to recipients of public contracts and subsidies.

An effective and efficient verification system of beneficial owners and their interests **has** a value of its own. The more adequate, accurate and current the information will be about the beneficial owner, nature and extent of beneficial interest in those public registers, the better information will the individual persons and organisations that prove legal interest obtain from those public registers under their right stipulated in Article 30 (5) of the Directive 2015/849.

However, solid information on beneficial owners and their interests can also serve the purposes of the fight against tax avoidance as confirmed by conclusions of the Council of Ministers on tax transparency from October 2016 which require the best possible quality of information on beneficial owners in the register of beneficial owner(s).²⁵¹ If the beneficial ownership certification mechanism were able also to certify that corporate entities within the ownership structure published their annual financial accounts statement as they are obliged under the Accounting Directive, it would also be possible to determine the overall effective corporate tax rate of companies or group of companies.²⁵² on that basis it could then be envisaged that a company or group of companies which would had a very low effective tax rate, for example, below ten percent - suggesting that such company or group of companies is engaged in the use of aggressive tax planning practices or tax havens - such company or group of companies could be prevented from accessing public contracts or subsidies either from the EU budget, EU funds or public funds of Member States as required by the Resolution of the European Parliament on corporate tax transparency of December 2015.²⁵³

²⁵¹ Pt. 8 of the Conclusions; available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/10/11-ecofin-conclusions-tax-transparency/>

²⁵² Transparency International Czech Republic and Lexperanto: www.taxparentmark.eu

²⁵³ Recommendation C.3. of the Resolution of the European Parliament “Bringing transparency, coordination and convergence to corporate tax policies” European Parliament resolution of 16 December 2015 with recommendations to the Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union (2015/2010(INL)).

Level of intensity of disclosure and knowledge of corporate and control structure, including beneficial owner by public authorities	What is disclosed and evidenced?	Where is it applied?	Difference against the previous level / what's the problem of this solution
Level 0 – Extremely weak	Legal person concerned declares there is no problem with the persons who have a <u>direct ownership and control</u> in this legal person, (incorrect declaration possibly sanctioned by administrative or criminal penalties)	Article 106 (4) and (10) of Financial Regulation 966/2012/EU and Article 143 (1) and (4) of Financial Regulation 1268/2012 of the EU Financial Regulation and of Arts. 51, 57, 59 and 60 of the Public Procurement Directive (if interpreted narrowly as not including persons with indirect control)	The disclosure obligation concerns only direct owner(s) or controlling person(s) of the legal person / Very easy circumvention of conflict-of-law, corruption, criminal proceeds hiding and economic sanctions enforcement by moving the sanctioned persons to the second level of corporate ownership and control
Level 1 – Very weak	Legal person concerned declares there is no problem with the persons who <u>directly or indirectly own and control</u> this legal person, i.e. controlling persons within its corporate and control structure (incorrect declaration possibly sanctioned by administrative or criminal penalties)	Article 106 (4) and (10) of Financial Regulation 966/2012/EU and Article 143 (1) and (4) of Financial Regulation 1268/2012 of the EU Financial Regulation and of Arts. 51, 57, 59 and 60 of the Public Procurement Directive (if interpreted widely as including persons with indirect control)	The corporate and control structure as well as the beneficial owner remains unknown, but at least the obligation covers the entire control and ownership structure, including beneficial owners / No one can effectively verify whether the statement made by the legal person is correct since no one knows either the corporate and control structure or the beneficial owner(s)
Level 2 - Weak	Beneficial owner of the legal person is declared without the disclosure of the related corporate and control structure	Required by Art. 30 of the AML Directive 849/2015/EU for the purposes of the prospective registers	Beneficial owner of the legal person is known, but not the corporate and control structure / No one can effectively verify

	(incorrect declaration possibly sanctioned by administrative or criminal penalties)	of beneficial owners (applied in the UK, in SK applied for legal persons receiving public contracts)	whether the declared beneficial owner(s) is indeed the true beneficial owner as there is no information on the corporate and control structure connecting the legal person and the beneficial owner(s)
Level 2/3 – Medium light	Same as under Level 0 / Level 1	To be reached by EU institutions, including OLAF, and certain Member State bodies thanks to the Practice Guide and learning e-tool developed by Transparency International CZ	Supervisory authorities have the knowledge where to find the information and evidence on the corporate and control structure
Level 3 - Medium	Corporate ownership structure, including beneficial owner, of the legal person is disclosed in a declaration, but nothing is evidenced	Required by Art. 13 (1) b) of the AML Directive 849/2015/EU from clients of financial institutions	Apart from the beneficial owner of the legal person, its corporate and control structure is disclosed (it shows how the legal person and the beneficial owner are connected) / difficult to verify that the declared corporate and control structure is accurate, in particular where the evidence on it is not public
Level 4 - Strong	Corporate ownership structure, including beneficial owner, of the legal person is disclosed in a declaration, and evidenced by electronic copies of relevant documents	To be required by the Czech Public Procurement Act as of 1 November 2016	Declaration containing the corporate and control structure, including the beneficial owner(s), is evidenced by electronic copies of the relevant documents / slightly higher costs than if declaration of ownership structures

			presented only, but easy cost of verification of accuracy of the declared structure
Level 5 - Very strong	Corporate ownership structure, including beneficial owner, of the legal person is disclosed through a declaration, and evidenced by the originals of the relevant documents	Required by the EU regulators when granting license for banking, insurance or financial intermediary activities	Evidencing documents of corporate ownership must be submitted as originals with official translation and necessary legalisation requirements (apostille or supra legalisation etc.) / high costs of getting the documents in the required form
Level 6 - Extremely strong	Corporate ownership structure, including beneficial owner, is disclosed through a declaration, and evidenced by the originals of the relevant documents issued by public authorities only		Evidencing documents of corporate ownership issued by private persons, even if regulated, such as banks, are not recognised as sufficient proof / necessity of global harmonisation of the ways of evidencing corporate and control structure by requiring all corporate ownership to be registered by public authorities