

Prevention of Money Laundering and Terrorist Financing: Identity of beneficial owners

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New guidance has been issued outlining the practical measures which should be taken by professionals to identify beneficial ownership and fulfil anti-money laundering and combating terrorism financing (**AML/CFT**) obligations.

On 20 December 2019, the Commission de Surveillance du Secteur Financier (**CSSF**) published Circular 19/732 (the **Circular**) to provide guidance to all professionals subject to AML/CFT obligations under the supervision of the CSSF. The Circular provides practical guidance on the legal requirements applicable to the identification of the ultimate beneficial owner(s) (**UBO(s)**) and includes illustrative examples. It outlines the reasonable measures that should be taken to verify the identity requirements and provides useful indicators to help detect potential concealment of beneficial ownership information.

A publicly available central register of beneficial owners (Registre des bénéficiaires effectifs) (the **RBE**) in Luxembourg was established in law on 13 January 2019 and came into force in March last year. A deadline for registration with the RBE first set at 31 August 2019 was subsequently postponed to 30 November 2019 by an administrative decision of the Luxembourg Business Registers.*

Key points of the Circular

Where the professional's customer is a natural person, such customer will in principle be the UBO, unless the customer is acting on behalf of (or fronting for) another person. In such cases, appropriate measures should be taken by the professional to determine if that person is the UBO.

Where the customer is a legal person or a legal arrangement, on the basis of article 1(7) of the law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended (the AML Law), the Circular lays out a threefold cascade procedure to determine ultimate beneficial ownership as follows:

- i. identify the natural person(s) who directly or indirectly holds or controls a sufficient percentage, namely more than 25% of the shares, voting rights or ownership in an entity;
- ii. where no natural person can be identified under any of the scenarios under (i), identify any person who controls the legal entity via other means; and
- iii. after having exhausted all possible means and provided that there are no grounds for suspicion, where no person under i) and ii) is identified, or if there is any doubt that the person(s) identified is/are the beneficial owner(s), identify any person who holds the position of senior managing official (dirigeant principal).

The CSSF has made it clear that measures (i) and (ii) above are not alternative options but cascading measures, which should be followed until all UBOs have been correctly identified. The CSSF stresses that measure (iii) constitutes an express fallback option only applicable when all possible measures to identify the UBO under (i) and (ii) have been exhausted without success.

When identifying the UBOs of their customers, professionals should collect proof of registration or an excerpt of the RBE or similar registers abroad. However, professionals must not rely solely on the contents of such registers to fulfil their customer due diligence obligations. The extent and depth of the measures needed to identify the UBOs depend on the type of customer and, therefore, need to be commensurate with inter alia the complexity of the structure and the customer's location.

Professionals should keep records of all actions taken to identify the UBOs under point (i), (ii) or (iii) and they should be ready, when requested, to justify the measures they have taken.

Where no UBO has been identified, the business relationship cannot be established. In the case of an existing business relationship, the CSSF recommends that the professionals do not carry out the transaction(s) and/or terminate the business relationship and file a report of ML/FT suspicions, where necessary.

The CSSF has provided some illustrative examples, which are not meant to be exhaustive and include the following clarifications:

- With respect to companies whose shares are admitted to trading on regulated markets (EU or equivalent): In principle, pursuant to the specific exemption provided by article 1(7)a)i) of the AML Law, there is no need to identify the UBO of such companies. However, companies issuing securities other than shares and companies whose shares are admitted to trading on a market other than a regulated market (such as an MTF) do not qualify for the exemption provided by the AML Law and therefore, their UBOs must be identified and verified according to the threefold cascade procedure.
- With respect to majority control: where a natural person indirectly owns 25% or less of the

shares in a customer via their ownership in a legal entity, in principle, the relevant natural person should not be considered as UBO as he/she doesn't reach the required more than 25% threshold. However, as he/she owns a majority in the legal entity owning the customer (over 50% of the shares), he/she exercises de facto effective control over such legal entity. Therefore, the natural person in question should be considered as UBO.

- With respect to a person who holds the position of senior managing official (SMO): the CSSF notes that, in principle, one SMO (and this being a natural person) where appropriate, should be retained as UBO. Where a collegial or jointly responsible body is in charge, more than one SMO can be designated as UBO. The CSSF stresses that determining the SMO depends on the actual senior managing responsibilities attributed and tasks performed rather than on the official title. The SMO can be understood as either the executive official or the member of the board of directors to whom the daily management has been delegated, and if no such delegation has taken place, the members of the board of directors.

Once the UBO(s) has been identified, the professional should take reasonable measures to verify the identity of the UBO(s) and to be satisfied that the documents provide sufficient evidence of the UBO's identity. In this respect, professionals should consider whether the documents relied upon could have been falsified. The CSSF notes that the practical implementation of the verification requirements differ between the customer and the UBO. The obligation to verify the identity of the UBO is to take reasonable measures as to be satisfied that the professional knows who the UBO is and that it understands the structure and ownership of the customer. Professionals should verify the identity of a customer or a UBO on the basis of documents or information obtained from a reliable source which is independent of the customer, for example an official (public) authority, taking into account the ML/TF risk associated with the business relationship.

Finally, the Circular provides useful indicators to help detect potential concealment of beneficial ownership information on the basis of the FATF Publication on Concealment of Beneficial Ownership dated July 2018, which is annexed to the Circular. The FATF Report to the G20 on beneficial ownership is also annexed to the Circular.

* The Luxembourg Business Registers is the administrator in charge of the management of the Trade and Companies Register (RCS), the electronic central platform of official publications named the Recueil électronique des sociétés et associations (RESA) and the Register of Beneficial Owners (RBE).

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