

Article

Ultimate Beneficial Owner (UBO) Registers: The time for implementation has come for Cyprus

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Introduction

As part in a chain of reforms proposed by the European Commission, in 2015 the European Union (the “EU”) adopted a modernised regulatory framework encompassing the Fourth Anti-Money Laundering Directive 2015/849 (the “AMLD IV”). The AMLD IV is a milestone in the Commission’s Action Plan to remedy the undoubtable shortcomings of Europe’s anti-money laundering framework evident by several money laundering cases and terrorist attacks. Despite the lack of harmonisation and successful implementation across the EU, in June 2018, the European Parliament proceeded with the publishing of the Fifth Anti-Money Laundering Directive 2018/843 (the “AMLD V”), forming one of the latest weapons of the EU in the fight against money laundering and terrorist financing.

In this article, we examine the application and impact of the Ultimate Beneficial Owners Registers (the “UBO Registers”) as one of the key initiatives introduced by the AMLD IV and supported by the AMLD V.

Purpose and Goals of UBO Registers

It is understood that the ultimate purpose of the introduction of UBO Registers is the enhancement of transparency. Transparency acts as a catalyst against the manipulation of the financial system for the enabling of money laundering and terrorist financing.

UBO Registers could lead to a variety of beneficial effects, including the possible reduction of corruption and fraud or the empowerment of a wide range of businesses in their effort to carry effective due diligence. Nonetheless, one of the most crucial roles that the Registers are called to play, is the strengthening of societal trust.

Following a series of scandals and leaks that shook the EU and brought doubts as to the intentions and effectiveness of our legal and financial systems, the imposition of transparent beneficial ownership registers somewhat restores society’s faith. These registers could be used as a critical tool for combating structures that further anonymity and corruption. It is an instrument that could potentially allow us to investigate and expose those who act against public interest, leaving society with a sense of justice.

The workings of the UBO Registers in Cyprus

Following the decision of the Council of Ministers on the 16th of December 2020, Cyprus has officially activated the UBO Register regime. The Council of Ministers has decided to:

1. Appoint the Registrar of Companies and Official Receiver (the “RoC”) as the competent authority for the maintenance of the central register of ultimate beneficial owners of companies and other legal entities; and
2. Authorise the RoC to collect information about the ultimate beneficial owners and other legal entities through the interim system that has been developed.

The RoC had initially set the 18th of January 2021 as the starting date of the data collection but later announced that the official starting date shall be the 22nd of February 2021.

From this date, companies will be granted a grace period of 6 months for submitting relevant information into the system. It is emphasised that the system that has been developed is an interim solution and access to it is only permissible to competent authorities upon submission of a formal request to the RoC.

The information collected will be transferred into a final system solution to be developed in the second half of 2021 and access to it will be based on the provisions of the AMLD V.

The RoC urged companies to start collecting the above information, which they should already have in their possession based on the provisions of article 61 (A) of the Prevention and Suppression of Money Laundering and Terrorist Financing Law of 2007-2019 (L.81(I)/2019), as amended from time to time (the “AML Law”).

In addition, such data should also be kept by liable entities that provide services to companies under the provisions of Articles 2A (d), 60 and 61 of the AML Law in the context of the exercise of due diligence measures and on the basis of the provisions of the Law Regulating Companies Providing Administrative Services and Related Matters of 2012, as amended (L.114(I)/2020).

Determining the UBO

An ultimate beneficial owner (UBO) is defined as any natural person who ultimately owns or controls the customer and/or the natural person on whose behalf a transaction or activity is being conducted and includes at least in the case of

(a) corporate entities:

- (i) the natural person who ultimately owns or controls a corporate entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that corporate entity. An indication of direct shareholding is 25% plus one share or an ownership interest of more than 25% in the customer held by a natural person and indirect ownership is 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, or by multiple corporate entities which are under the control of the same natural person(s).
- (ii) if after exhausting all possible means no other person is identified or if there is doubt that the person identified is the beneficial owner, the natural person who holds the position of senior managing official.

- (b) in the case of trusts, the settlor, the trustee, the protector (if any) the beneficiary or class of persons in whose main interest the legal arrangement or entity is set up or operates, and any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means.
- (c) in the case of foundations and legal arrangements similar to trusts, the natural person holding equivalent or similar positions to the person referred to in the case for trusts.

What information should be included in the Registers?

As a minimum, the following information must be kept up to date and communicated for each UBO:

- ✓ name
- ✓ date of birth
- ✓ nationality
- ✓ address
- ✓ nature and size of interest
- ✓ when she/he became a UBO

Trust Registers

It is worth noting that another controversial aspect of the AMLD IV and AMLD V is the introduction of the requirement to disclose the beneficial ownership behind trusts through “Trust Registers”.

In relation to trusts, the beneficiary will be determined pursuant to the provisions of the “Determining the UBO” section of this Article. Once the beneficiary is determined, the following information shall be mandatorily disclosed through the Trust Register:

- ✓ the settlor
- ✓ the trustee(s)
- ✓ the protector, if any
- ✓ the beneficiary or class of beneficiaries
- ✓ information on any other person exercising control over the trust

It should be noted that in Cyprus, the Trust Register will be supervised and maintained by the Cyprus Securities and Exchange Commission (the “CySEC”).

Access to the Registers

Under the AMLD IV only government agencies, obliged entities and individuals with legitimate interest have access to the Registers. The AMLD V, however, provides for access by the public as well. Access to beneficial ownership information will be granted to any natural or legal person that can demonstrate a legitimate interest as well as to any person filing a request in relation to a trust or similar legal arrangement which holds or controls any corporate or other legal entity. Beneficial ownership information will be available and effected through online registration and the payment of a fee.

While there are claims that public access could prove invasive, there are also arguments supporting that the requirement to register beneficial ownership and have that information publicly available is a vital step in detecting and preventing part of the large amount of illicit funds transmitted through the financial system. Another major concern is that Member States are called to define “legitimate interest”, both as a general concept and as a criterion for accessing beneficial ownership information in their national law. This could ultimately result in the absence of harmonization across Member States and in different approaches being implemented.

The Correlation between UBO Registers and KYC Obligations

According to AMLD IV and AMLD V, Member States shall require that obliged entities do not rely exclusively on the UBO Registers to fulfil their customer due diligence requirements. This means that UBO Registers do not in fact simplify the customer due diligence process nor the need for organisations to carry out detailed customer checks.

UBO Registers could form a useful tool towards developing a centralized KYC database with governments actively involved in the compliance process. Instead, it could be argued that this measure merely complicates existing AML requirements. Evidently, the increase in the information requested does not necessarily guarantee the accuracy of such information without the establishment of an ongoing and rigorous verification process from governments. Consequently, obliged entities could be left not only with the cost of compliance with yet another AML requirement but also with the burden of an additional source of information to check.

Conclusion

The evolution of the financial sector, driven by our need for technology-driven, agile solutions, has come with inherent risks and a plethora of new money laundering and terrorist financing practices. Europe has struggled to eliminate such risks in the past despite its continuous efforts for an efficient framework.

AMLD IV and AMLD V aim to change this through a series of additional measures, varying from bringing virtual currencies under AML scope, the broadening of the PEP and PPF definitions, the increase of the already enhanced due diligence requirements with regards to High-Risk Third Countries and many more. The most controversial and debatable measure, however, has been the establishment of UBO Registers.

The Registers aim to reveal the identity of beneficial owners not only to governmental bodies and competent authorities but also to the public. Such increase in the scrutiny and surveillance obliged entities undergo, has been criticized as bordering the limits of data protection rights. Entities are expected to balance the coexistence of data protection and beneficial ownership disclosure obligations. The line of whether the data disclosed through UBO Registers falls within the borders of relevance and necessity and indeed satisfy the requirement of fulfilling a “lawful purpose”, is extremely fine and a tough one for the market to set.

It is also argued that if the true objective behind the Registers is to develop trust, publishing information that has not undergone a thorough verification process, could have the exact opposite result. It seems that unless a common practice is established throughout the European Union as to the creation, management and verification of the Registers, we are left with added data but no added value.

Regardless, the market is called to comply and implement the ever-changing developments in the anti-money laundering and counterterrorist financing legislations. While not having fully adapted to the AMLD V (or even the AMLD IV), Directive 2018/1673 (the “AMLD VI”) is underway, introducing criminal law into the existing legal field.

The outcome of centralizing and publishing beneficial ownership remains to be seen, meanwhile market participants are expected to comply with existing directives and prepare for the new series of measures that shall come.

The foregoing should not be read or construed or relied upon as legal advice in any specific or individual circumstance.

In the event of any query or need for clarification please contact the undersigned.

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