

Introduction

During March 2023, the Financial Action Task Force (FATF) updated the previous guidance and recommendations on the identification of beneficial owners. This intervention follows a study published by the National Council of Notaries and provides additional information on handling regulatory data, often lacking or otherwise fraught with interpretative uncertainties.

This twofold intervention, both at the national and supranational levels, is an opportunity to provide a general overview of legislation applicable to the so-called “beneficial owner” and the criteria for identifying the beneficial owner, providing some useful guidance on navigating through the applicable legislation.

As known, the European legislator specifically introduced the regulatory system to prevent the use of the financial system for money laundering and, thus, to counteract terrorist financing, which has been implemented over the years by individual EU member states, aimed at ensuring a certain transparency of assets used in economic transactions.

In this context, the role of the beneficial owner, defined as “the natural person or persons, other than the client, for whose benefit, or in the final instance, an ongoing relationship is established, a professional service is provided, or a transaction is executed,” plays a key role.¹

The beneficial owner² thus appears to be the natural person to whom the effects of a legal transaction are to be imputed, i.e. the actual beneficiary. Given the complexity of some corporate structures, this figure does not necessarily overlap with the one formally affected by the transaction.

Applicable Law

There are several regulatory sources that govern AML:

- EU Directive 2015/849, as amended by EU Directive 2018/843
- Legislative Decree 231/2007, as amended by Legislative Decree 60/2017 and later by Legislative Decree 125/2019 (the Anti-money Laundering Decree)
- Technical rules issued by the self-regulatory bodies referred to in Art. 11 of Legislative Decree 231/2007 (the Anti-money Laundering Regulation)

In addition to the customer verification requirement of the Anti-money Laundering Regulation, customers now have a duty³ to identify the beneficial owner and to provide this information to the parties concerned.

At a practical level, it is, therefore, essential to understand the general criteria for identifying the beneficial owner, bearing in mind that the contrast between the requirements of transparency and confidentiality is the basis for the interpretation of the Anti-money Laundering Regulation.

The Anti-money Laundering Decree, transposing the provisions of international and European law, establishes the criteria for determining the effective ownership of customers. In particular, in the case of:

- Beneficial owner in the context of a natural person transaction: usually, the beneficial owner overlaps with the client.

However, a natural person may act through a representative and, in this scenario, the representative will be a mere executor and, therefore, not identifiable as a beneficial owner (which will be the natural person represented/customer).

¹ Art. 1(2)(pp) Legislative Decree No. 231 of 21 November 2007.

² The analysis of the beneficial owner shall also include the assessment in relation to the status of a politically exposed person (PEP). According to the AML Compliance, PEPs are to be understood as “natural persons who hold or have ceased to hold important public office for less than one year, as well as their family members and those who are known to have close links with such persons”.

³ If the client is a company, the entity required to provide the relevant information is the entity represented (usually the director), while in the case of a trust, the entity retained is the trustee.

In fact, the beneficial owner and the client are not the same if institutions are used to achieve a real in-person interposition between the client and the beneficial owner (this is the example of the unrepresented mandate or the fiduciary relationship).

If the person required to carry out the necessary verifications under the Anti-money Laundering Regulation has a suspicion of falling under such regulation, it must request all the necessary information from the customer to verify the true identity of the beneficial owner.

Beneficial owner in the context of a transaction carried out by limited liability or joint-stock companies: several criteria are used to identify the beneficial owner and must be applied in a scaled-down manner, and not in an alternative manner. Regarding such companies, the Anti-money Laundering Regulation provides for the application of the following criteria:

(a) Using property criterion,⁴ the beneficial owner is defined as the following:

- (i) It is the natural person who directly owns more than 25%⁵ of the equity interest of the company
- (ii) In the case of indirect ownership, it is the entity that holds more than 25% of the equity interest of the company through subsidiaries, trustees or interposed persons

The ownership of partial rights in rem over participations or of a guarantee over them (e.g. usufruct and pledge) is suitable to supplement the indirect ownership⁶ of companies if the holder of the voting right exercises this right in their own interest.

(b) Subject to the first criterion in subparagraph (a) above, the control criterion shall apply⁷ where the beneficial owner is the natural person who is ultimately responsible for controlling the capital company under:

- (i) Control of the majority of votes exercised in ordinary meetings
- (ii) Control of sufficient votes to exercise a dominant influence⁸ in ordinary meetings
- (iii) The existence of particular contractual constraints enabling a dominant influence to be exercised

Therefore, the beneficial owner could also be identified in several natural persons linked to each other by relationships and relationships that result in the ownership or control of the company (e.g. shareholder agreements, even if they are not subject to mandatory disclosure, voting unions, contractual obligations or joint ownership of shareholdings).

- (c) Should the two above criteria in points (a) and (b) not allow the beneficial owner to be identified, the beneficial owner is deemed to be the natural person with powers of legal representation, administration or management of the company or client other than a natural person (e.g. legal representative, executive director or director).

There is no specific hierarchical order for these powers, which are not cumulative, alternative or subsidiary in nature.

Non-profit institutions without legal personality shall be subject to the residual criterion set out in point (c).

- Beneficial owner in the context of a transaction carried out by private legal persons:⁹ the Anti-money Laundering Decree cumulatively identifies as beneficial owners:

- (a) The founders, whether alive
- (b) Beneficiaries, when identified or easily identifiable
- (c) The holders of powers of legal representation, management and administration

- Beneficial owner in the context of a transaction carried out by partnerships: the Anti-money Laundering Decree provides that the beneficial owner in partnerships is the natural person who is ultimately attributable to either:

- (a) Direct or indirect ownership¹⁰ of the company
- (b) The control of such matters (powers of representation, disjoint, joint or joint administration or management)

For the purpose of identifying the beneficial owner, non-recognised associations and consortia shall be treated in the same way as partnerships.

Therefore, in most cases, since these bodies are generally composed of a broad shareholding structure, in non-recognised associations the beneficial owner is the same as the directors, while in partnerships with the shareholders.

In the case of a limited partnership, the beneficial owner would be the same as those shareholders who are also directors, whether or not they hold the majority of the company's capital.¹¹

⁴ The Italian legislator has not indicated what is to be understood by "property". However, it is preferable to consider that bare property and other partial rights in rem are also covered by this concept.

⁵ The guidelines approved by the National Board of Chartered Accountants and Auditors in February 2021 (Guidelines) consider that the 25% equity interest ownership threshold applies solely to the corporate capital of the client company. Therefore, ownership of 25% shareholdings in companies located along the shareholding chain that reach the 25% threshold in relation to the share capital of the client company is considered irrelevant. However, the proposal for a European Regulation of 20 July 2021 and the recent council intervention on the prevention of the use of the financial system for the purpose of money laundering or terrorist financing of 7 December 2022 have confirmed that the 25% threshold does, however, apply at every level of the chain and not only in relation to the client company. It is considered that this second interpretative reading should be followed as a precaution, primarily, and secondly, since it is considered that these sources should be preferred to the guidelines (which have no obligation).

⁶ In the case of shares or units pledged (or usufruct), the beneficial owners appear to be both the foreclosure creditor (and the usufruct) and the naked owner if a natural person holds more than 25 % of the equity interest.

⁷ This criterion follows the definition of control set out under the national legislature in Article 2359, paragraph 1, Italian civil code

⁸ The guidelines for "dominant influence" refer to the ability of the natural person or persons to direct the business of the company as intended by the beneficial owner.

⁹ These are entities with legal personality, including recognised associations and foundations, committees and cooperative societies.

¹⁰ More than 25% of capital or profit participation

¹¹ In these terms, the Anti-money Laundering Commission of the National Council of Notaries 2023 expressed itself.

Special Cases

The guidelines and the study published by the National Council of Notaries at the beginning of 2023 propose some criteria to be used for certain particular situations and for which there may be some interpretative doubt in the identification of the beneficial owner:

- (a) Mutual investment fund and SGR: a fund, although not having legal personality, has a separate and distinct asset from the SGR managing it. The beneficial owner shall, therefore, be identified as follows:
 - (i) SGR: using the capital company criteria
 - (ii) Mutual investment fund: a shareholder with a participation in the fund of more than 25% or the holder of the powers of representation, administration and management of the mutual fund (i.e. manager of the SGR)
- (b) Fiduciary companies:¹²
 - (i) If the trustee acts on behalf of the beneficiary:
 - a. The trustee as a client is required to provide, in writing, the necessary information on the beneficiaries as beneficial owners of the relationship or transaction
 - b. If trustees are persons other than natural persons, the data of the beneficial owner must be identified and verified
 - (ii) If the trustee acts in its own name and on its own account, the data of the beneficial owner of the trustee must be identified and verified in accordance with the company rules.
- (c) Trusts (and similar legal arrangements): Beneficial owners must be cumulatively identified in the constituent (if still alive), trustee, guardian (if appointed by the trustee) and other natural persons exercising control over the trust, or similar legal arrangement, through direct, indirect ownership or other means.

If the trustee is a legal entity, it will be necessary to identify the beneficial owner using the criteria set out in the Anti-money Laundering Decree for the above companies.
- (d) Communion of shares: Beneficial owners are identified as communist entities that can exercise control over communion.

If a beneficial owner cannot be identified, this may be an indicator of anomaly in accordance with the risk assessment parameters referred to in the Anti-money Laundering Regulation.

Register of Beneficial Owners

The FATF recommendations note that the multiple approach, the method of combining information from, *inter alia*, companies themselves and public authorities, is the most efficient and appropriate approach to protect the financial system and identify the beneficial owner.

For this purpose, with the Ministerial Decree of 29 September 2023, published in the Official Gazette of 9 October 2023, the Ministry of Enterprise and Made in Italy established the entry into force of the register of beneficial owners (UBO Register) in Italy.

At the operational level, two subsections to the Companies' Register have been added, in particular (i) an autonomous section (companies with legal personality and private legal persons), and (ii) a special section (trusts producing significant legal effects for tax purposes and related institutions).

Pursuant to Legislative Decree No. 55 of 11 March 2022, directors of companies with legal personality must communicate to the competent Chamber of Commerce's Business Register Office for registration and retention in the appropriate section of the business register:

- (i) The identification data and nationality of the natural persons indicated as beneficial owner
- (ii) The percentage of the holding in the capital of the company held by the natural person designated as the beneficial owner
- (iii) Where the beneficial owner is not identified on the basis of the principle of ownership, the manner in which control is exercised or, as a last resort, the powers of legal representation, administration or management of the institution exercised by the natural person designated as the beneficial owner

Existing entities will have 60 days from the publication of Ministerial Decree of 29 September 2023 to report the required data on the beneficial owner (i.e. by 11 December 2023), whereas entities that will be set up after such regulation will have 30 days in which to make communications, starting from their registration in the competent Companies' Register or their incorporation.¹³

Should any data and information change relating to the beneficial owner, this must be communicated within 30 days from the completion of the act resulting in such change.

In addition, entities will be required to confirm the reported data and information on an annual basis. For entities with legal personality, the obligation to confirm the data relating to the beneficial owner may be fulfilled while filing their financial statements.

To date, the question remains as to whether foreign companies with secondary offices in Italy need to be registered in the Italian UBO Register.

¹² CNN approved Customer due diligence Guidelines on 4 April 2014.

¹³ Failure to communicate, or late communication, is subject to administrative fines amounting from €103 to €1,032. If the notification is made within 30 days of the expiry of the prescribed time limits, the fine shall be reduced to one-third.

Indeed, it could be considered that, for foreign companies with their head office in an EU member state, registration in the respective beneficial owners register of that EU member state, linked to the European beneficial owners Register (BORIS),¹⁴ may be sufficient.

The more cautious interpretation would seem, however, to consider that registration in the Italian UBO Register is also necessary for the secondary offices of foreign companies incorporated in Italy. It is to be hoped that some clarification on this point can be provided by the chambers of commerce engaged in maintaining the UBO Register once it has officially entered into force.

Conclusions

As seen above, the Anti-money Laundering Regulation is still complex, intricate and sometimes lacking specific guidelines compared to practical questions encountered by operators, with a certain level of uncertainty as to the identification and activities to be carried out by obligated entities and the beneficial owner. Moreover, the criteria for identifying the beneficial owner lead, in most cases, to designating as such the current managing body of the client company, which somewhat thwarted the legislator's intention to expose money laundering and terrorist financing.

Only following the operation and use of the UBO Register in Italy, and the fulfillment of the reporting obligations related to the establishment of the register, it will be possible to assess whether there is a need for further clarity on the beneficial owner and the practical usefulness of identifying the beneficial owner through the criteria set out in the Anti-money Laundering Compliance Regulations.

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¹⁴ In order to monitor the relevant financial information in the case of cross-border transactions, the European legislator has provided for a system of interconnection of the central registers of beneficial owners of member states, which is operational as of 22 March 2022.