

## IN SEARCH FOR THE ULTIMATE BENEFICIAL OWNER

March 21, 2018

The increasing number of terrorist and cybernetic attacks has led to the adoption by EU bodies, of Directive (EU) 2015/849 of the European Parliament and of the Council, with respect to anti-money laundering and fight against terrorism (also known as the “4th AML Directive”). Also, in the context of increased use of virtual currencies and digital money, a 5th AML Directive, amending the 4th AML Directive, is currently being debated by the EU institutions, which will further strengthen the fight against crime and terrorism.



The National Office for Prevention and Combating Money Laundering of Romania (“Office”) has proposed in May 2017 a draft law on prevention and combating money laundering and terrorism financing, which transposes the 4th AML Directive. In February 2018, the Office has published a revised version of the draft law, which is currently pending approval by the Government before being submitted to the Parliament for debate.

As per the draft law, if you are an executive manager of a company, or if you manage a trust, or any other legal entity, or a legal arrangement without legal personality constituted under special laws, you will have to obtain and hold adequate, correct and up to date information on the beneficial owner of these entities or legal arrangements, including details on the interests owned which generate benefits.

Subsequently you will have to (i) register and update this information with the competent authorities (i.e. the Trade Registry for non-listed companies and the Central Depository for listed companies) and (ii) provide this information to reporting entities, as such entities are defined by the draft law (e.g. lawyers, notaries, tax and financial advisors, financial and credit institutions, real estate agents, other professionals providing services etc.) when they perform customer due diligence.

## **WHO ARE THE BENEFICIAL OWNERS OF A COMPANY?**

The beneficial owner of a company who is not listed on a regulated market subject to disclosure requirements in accordance with EU Law or international standards, is the individual who ultimately owns or controls the legal entity, directly or indirectly, including:



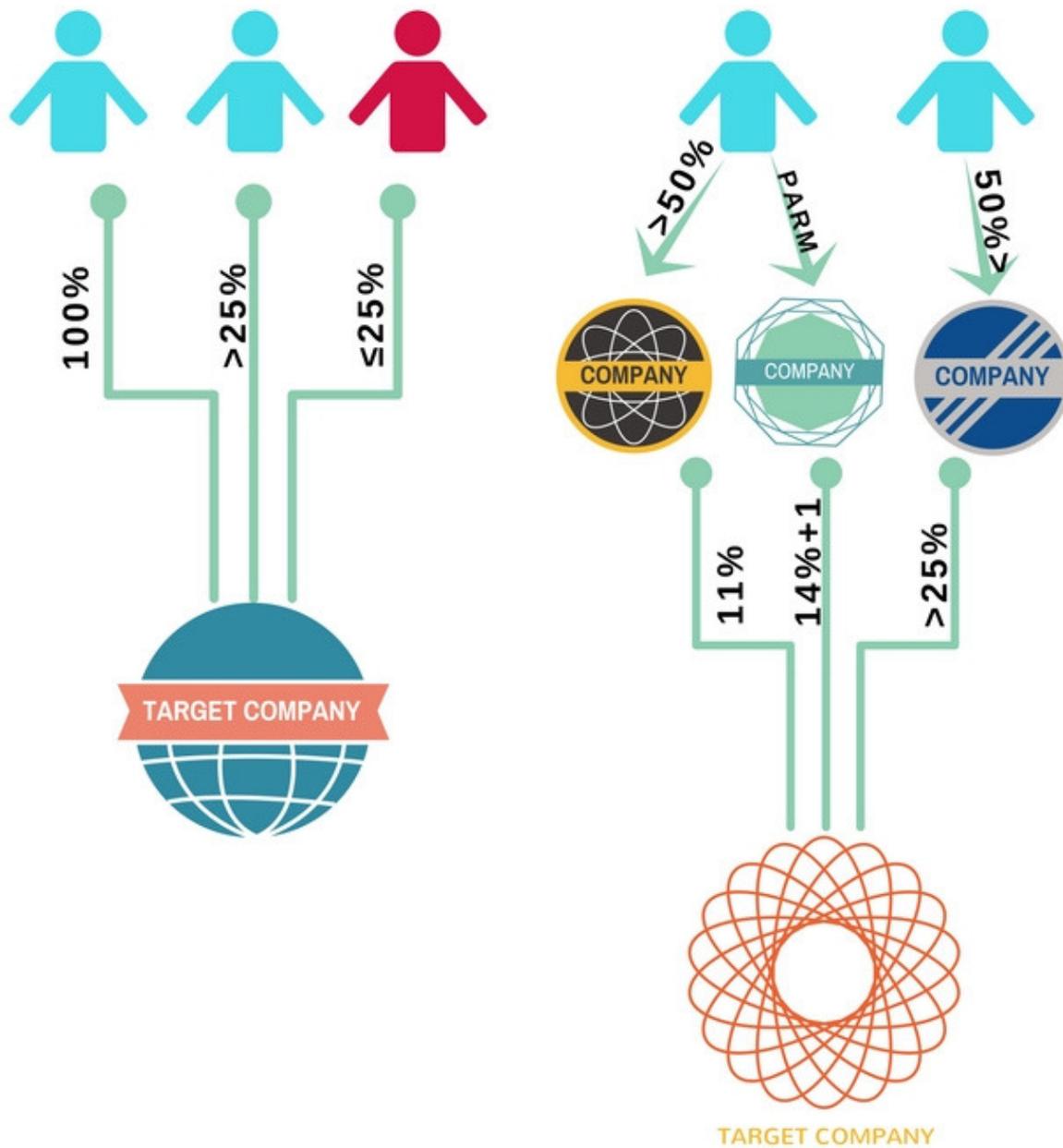
– an individual owning, directly or indirectly (e.g. through shares owned by another company under his control) 100% or at least 25%+1 of the shares or voting rights of the company or more than 25% owner's equity in the company;

– an individual who holds a senior management position if:

(i) after all possible means have been exhausted and provided that there are no grounds to submit a suspicious activity report, no natural person was identified in accordance with letters a) or b) or

(ii) there is any doubt that the identified person is the real beneficiary.

Based on the above, such ultimate beneficial owners (“UBO”) may be as follows:



**LEGEND**

 ULTIMATE BENEFICIAL OWNER

 NOT A BENEFICIAL OWNER

**PARM** POWER TO APPOINT OR REVOKE THE MANAGEMENT OR SUPERVISORY BOARD OF THE TARGET COMPANY

**TARGET COMPANY** THE COMPANY FOR WHICH THE ASSESSMENT IS MADE

Keeping updated records of the beneficial owner is relatively easy when the shares of a company are entirely owned (100%) by an individual, but becomes challenging when a company is part of a complex group structure which includes (i) investment funds and/or (ii) foundations incorporated in other jurisdictions. Also, there are cases in which the shareholding structure is so diluted that an individual holding a participation of more than 25% cannot be identified.

Reporting entities, when dealing with clients who are part of complex group structures, will have to adopt reasonable measures to identify and verify the identity of the ultimate beneficial owner, so that they are certain who is the ultimate beneficial owner of the company and understand the ownership and control structure of their client.

## **HOW WILL THE INFORMATION REGARDING THE ULTIMATE BENEFICIAL OWNER BE REGISTERED?**

The information will be registered with the Romanian offices of the Trade Registry based on a sworn statement given by the company's legal representative, containing the identification details of the beneficial owners and the ways in which control over the company is exercised by the beneficial owners.

## **WHAT IS THE DEADLINE FOR REGISTERING THE ULTIMATE BENEFICIAL OWNERS WITH THE REGISTRY AND HOW OFTEN IS THE INFORMATION UPDATED?**

The sworn statement must be notarized or given in front of the Trade Registry representative and must be submitted with the Trade Registry as follows:

- (i) for entities being incorporated, at the same time with the incorporation documents
- (ii) for existing entities, within 12 months as of the entry into force of the law.



The sworn statement must also be submitted (i) annually, within 15 days as of the approval of the financial statements and (ii) within 15 days as of the date a change has occurred with respect to the identification details of the beneficial owner. If the sworn statement is not drafted in Romanian language, it will need to be accompanied by legalized translations and depending on the country in which the sworn statement is given it may need to bear an a

apostille or super-legalization.

Failure to comply with the above obligations may result in fines between RON 5,000-10,000 applied to the company's legal representatives by tax inspectors or by the Office. The minutes containing the fine will be sent to the Trade Registry. If the sworn statement is not submitted with the Trade Registry within 30 days as of the date when the fine was applied, the Trade Registry may file a court request asking for the dissolution of the company.

## **WHICH INFORMATION WILL BE REGISTERED IN THE TRADE REGISTRY?**

The following information concerning the individuals that are ultimate beneficial owners will be registered with the Trade Registry: (i) first and last name; (ii) series and number of ID card or passport; (iii) date and place of birth; (iv) citizenship; (v) address of residence; (vi) nature and extent of the economic interest (i.e. number of shares and participation held, number of votes held).

## **WHO WILL HAVE ACCESS TO THE INFORMATION?**

Access to the information concerning beneficial owners held by the Trade Registry is ensured, free of charge, for: (i) authorities with supervisory and

control role, judicial bodies under the Code of Criminal Procedure and the Office, without any restriction and without alerting the concerned person(s), to (ii) reporting entities when they perform customer due diligence and to (iii) other persons or organizations proving a legitimate interest. The persons or organizations proving a legitimate interest will have access at least to the name, month and year of birth, nationality and country of residence of the beneficial owner, as well as the nature and extent of the economic interest.



The draft law does not provide any criteria to assess the legitimate interest, however such provisions may be established through secondary regulations or guidelines adopted by the Office or other relevant authorities. During the negotiations between the European Council and European Parliament it was revealed that such legitimate interest is deemed to exist with respect to investigative journalists and other concerned citizens<sup>1</sup>.

Under the 5th AML Directive proposal, the information held in the ultimate beneficial owner's registers will be publicly accessible. It will be interesting to follow the provision on the extent of personal data which will be made publicly available and how will such provision comply with the principle of proportionality provided by the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679).

## **WHAT ARE THE OBLIGATIONS OF REPORTING ENTITIES WITH RESPECT TO DATA PROTECTION?**

The draft law imposes certain obligations on the reporting entities, such as the obligation to:

- a) maintain the confidentiality of the processed information;

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<sup>1</sup> [www.europarl.europa.eu/news/en/press-room/20141216IPR02043/money-laundering-parliament-and-council-negotiators-agree-on-central-registers](http://www.europarl.europa.eu/news/en/press-room/20141216IPR02043/money-laundering-parliament-and-council-negotiators-agree-on-central-registers)

- b) comply with personal data regulations;
- c) to process personal data solely for the purpose of preventing money laundering and terrorism financing. Processing of personal data for marketing purposes is forbidden according to the draft law and would be in clear breach of the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679);
- d) ensure the proper and regular training of the employees on the provisions of the law, and on relevant data protection requirements;
- e) to implement policies, procedures and trainings sessions at group level, including data protection policies and policies and procedures on the exchange of information, in order to combat money laundering and terrorism financing, which they apply also to the owned branches and subsidiaries in Member States and third countries.

In addition to the above, the draft law also abolishes the provisions of Companies Law no. 31/1990 referring to the issuing and use of bearer shares by joint-stock companies. Existing companies issuing such shares will have to convert these shares in dematerialized shares and register the changes with the Trade Registry within 18 months as of the entry into force of the law.

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