

# Corporate ownership structures and beneficial ownership: verifying and registering the unknown<sup>1</sup>

*Dr. Ondřej Vondráček Ph.D., LL.M.<sup>2</sup>*

## Contents

1.	Introduction: Hiding of beneficial ownership .....	1
2.	The history of the issue of beneficial ownership in the EU explained .....	2
3.	The requirements regarding beneficial ownership in EU anti-money laundering rules....	5
4.	Public money legislation.....	7
5.	EU international sanctions and terrorism enforcement: ownership and control.....	9
6.	Lack of effectiveness of new rules on beneficial ownership .....	11
7.	Inefficiency and administrative burden of the new rules.....	14
8.	Conclusion: The need for a common EU interpretative guidance .....	16

## 1. Introduction: Hiding of beneficial ownership

The Panama Papers<sup>3</sup> and Swissleaks<sup>4</sup> scandal revealed an important problem. Despite the existence of rules on disclosure on ultimate beneficial owners under the internationally applied anti-money laundering rules, these rules remain very permeable and allow persons

---

<sup>1</sup> This contribution is a follow-up to the project of Centre of Economic Studies of University of Economics and Management.

<sup>2</sup> Dr. Ondřej Vondráček Ph.D., LL.M., is a lawyer of the DG Justice & Consumers of the European Commission. The opinions presented in this article are only of his own and cannot be attributed to the European Commission.

<sup>3</sup> The International Consortium of Investigative Journalists, 'The Panama Papers', <https://panamapapers.icij.org/>

<sup>4</sup> The International Consortium of Investigative Journalists, 'Swiss Leaks: Murky Cash Sheltered by Bank Secrecy', <https://www.icij.org/project/swiss-leaks>

subject to international sanctions, politicians as well as multinational companies to hide their beneficial owners. Hiding of beneficial owners or parts of ownership structures from the public authorities or the general public also allows groups of companies to channel profits to these hidden parts of ownership structures and, thus, avoid corporate taxation.

Renowned economists, including Thomas Piketty<sup>5</sup>, Gabriel Zucman<sup>6</sup> and Joseph Stiglitz<sup>7</sup> have proposed the creation of a world financial registry which would include equities – shares and their owners – to make it possible for tax authorities to check that taxpayers duly report their assets and income. However, a proposal establishing such a worldwide registry of owners of shares in companies<sup>8</sup> was rejected at the international level in 2013<sup>9</sup>. At the EU level the idea of establishing a registry of beneficial owners of legal persons fell on a fertile ground.

## **2. The history of the issue of corporate beneficial ownership in the EU explained**

The proposal of the future fourth Antimoney Laundering Directive issued by the Commission in 2014 still stipulated only that “Member States shall ensure that corporate or legal entities established within their territory obtain and hold adequate, accurate and current information on their beneficial ownership” and that “this information can be accessed in a timely manner by competent authorities and by obliged entities”,<sup>10</sup> in the legislative procedure in the European Council and the Parliament the Commission proposal was in this respect substantially amended: the European Parliament proposed to add an obligation for companies not only to know their beneficial owners, but also to register beneficial owners and their beneficial ownership interest in the registers of beneficial owners as well as a corresponding obligation of Member States to establish such registers and allow competent

---

<sup>5</sup> T. Piketty, 'Le Capital au XXI<sup>e</sup> siècle', (2013), Seuil, 843.

<sup>6</sup> G. Zucman, G., 'Taxing across Borders: Tracking Personal Wealth and Corporate Profits', (2014) 28, Journal of Economic Perspectives, 122.

<sup>7</sup> J.E. Stiglitz and M. Pieth, 'Overcoming the Shadow Economy', (2016) International Policy Analysis, Friedrich Ebert Stiftung, 9.

<sup>8</sup> Proposed by the government of the United Kingdom in 2013 at the G-8 summit in Lough Erne (Financial Times: G8 leaders promise corporate tax clampdown to bolster economies', 11 June 2013, 3, G8 backs tax and secrecy crackdown, 19 June 2013, p. 2; G8 summit: Leaders braced for battle on evasion, 11 June 2013, 4)

<sup>9</sup> Declaration issued from the G8 Summit at Lough Erne on agreed principles for the future, 18 June 2013, available at: <https://www.gov.uk/government/publications/g8-lough-erne-declaration>.

<sup>10</sup> Proposal for a Directive on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, European Commission, COM(2013) 45 final.

authorities and under certain conditions also natural and legal persons to look into these registers.<sup>11</sup> This amendment of the European Parliament was upheld in the maelstrom of the Luxleaks scandal and made it in to the final version of Directive 2015/849 adopted in May 2015. Subsequently, in 2016, in reaction to the Panama Papers scandal the European Commission decided, even before the entry into force of Directive 2015/849, to propose a further amendment to this Directive<sup>12</sup> which would almost fully<sup>13</sup> open registers of beneficial owners to the public. In parallel, an interconnection of these beneficial owner registers is envisaged<sup>14</sup>.

The term beneficial owner and the ownership and control structures first appeared at the supranational level in the 2003 Revised Forty Recommendations<sup>15</sup> of the Financial Action Task Force.<sup>16</sup> The definition of beneficial owner was contained in the Glossary attached to these Recommendation 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".<sup>17</sup> The process of identification and verification of the beneficial owner and ownership and control structure was described in an interpretative note to

---

<sup>11</sup> Art. 29 (1) of the Commission's proposal in the wording of amendment no. 93 proposed by MEPs Peter Simon and Mojca Kleva Kekuš.

<sup>12</sup> 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, 5 July 2016 (COM(2016)0450 final).

<sup>13</sup> Art.1 (10) of the Commission's proposal which inserts a new paragraph 7a to Art. 31 of Directive 2015/849 which provides for an exception in respect of access of the public to the registers of beneficial owners of trusts in respect of personal property. This exception reflect the recent decision of the French *Conseil constitutionnel* (Constitutional Court) which ruled that a full public access to information about personal property in trusts is disproportionate (Decision no. 2016-591 of 21 October 2016).

<sup>14</sup> 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, 5 July 2016, (COM(2016)0450 final).

<sup>15</sup> Recommendations 5, 33 and 34.

<sup>16</sup> Financial Action Task Force is an intergovernmental organisation existing since 1989, with headquarters in Paris, specialised in the fight against money laundering.

<sup>17</sup> FATF Glossary. Available at: <http://www.fatf-gafi.org/glossary/>

Recommendation 5.<sup>18</sup> In the new version of FATF Recommendations of 2012<sup>19</sup> the issue of beneficial ownership of legal persons and arrangements appeared in Recommendations 10 (on customer due diligence), 24 (on beneficial ownership of legal persons) and 25 (on beneficial ownership of legal arrangements). However, the recommendations, as such, do not provide for a definition of the beneficial ownership interest or control and ownership structure. In EU law, the definition of the beneficial owner and the reference to a control and ownership structure appeared for the first time in Directive 2005/60.<sup>20</sup>

The determination of beneficial owners and their interest may be an easy exercise if the ownership structure of a legal person is simple. A 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 their 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.<sup>21</sup>

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

---

<sup>18</sup> 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), 4<sup>th</sup> ed., Council of Europe Publishing, 305-307.

<sup>19</sup> FATF Recommendations, adopted on 16 February 2012, and updated in February 2013, October 2015, June 2016 and October 2016.

<sup>20</sup> OJ L 309, 25.11.2005, 15–36.

<sup>21</sup> 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).

However, the application of the definition of beneficial ownership in such an indirect ownership scenario<sup>22</sup> may, however, not be so straightforward, especially in situations of plurality of owners. When determining the ownership structure in situation of indirect ownership it is necessary, in the first layer of shareholders (owners), to identify whether any shareholders act in concert, who is the controlling shareholder or shareholders, whether shareholders who have used their interest as a collateral have not surrendered their voting rights to collateral takers etc. This evaluation is necessary to make at any level of shareholders (owners) up to the level of beneficial owners. The absence of guidance on what the notion of beneficial ownership interest and the process of identification and evidencing of shareholding interest and their owners will lead to the diverging interpretation in different Member States which, in turn, will lead to two negative consequences: lack of effectiveness in disclosing, evidencing and verification of ownership structures and beneficial owners, on the one hand, inefficiency and administrative burden for the legal persons concerned, on the other hand.

### **3. The requirements regarding beneficial ownership in the EU anti-money laundering rules**

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.<sup>23</sup> These guidelines clarify that the reference to “ultimately owns or controls” and “ultimate effective control” denote that situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control<sup>24</sup>; the notion of control then refers to the ability of taking

---

<sup>22</sup> In this scenario beneficial ownership interest is an indirect ownership interest: as stipulated in the definition of the beneficial owner in Directive 2015/849 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.

<sup>23</sup> 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.

<sup>24</sup> FATF Guidance on Transparency and Beneficial Ownership, Box 1, 8.

relevant decisions within the legal person and impose those resolutions, which can be acquired by several means, for example, by owning a controlling a block of shares.<sup>25</sup>

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 subjects, namely corporate entities, trusts and non-profit legal persons, who shall be considered as a beneficial owner in relation to these subjects; regarding the corporate entities it also gives 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 ownership<sup>26</sup> and indirect ownership<sup>27</sup> 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.

By contrast, Directive 2015/849 does not define the corresponding notions of ownership and control structure nor the notion of the beneficial ownership interest. Although Directive 2015/849 lacks the definitions of control and ownership structure it imposes upon financial institutions and DNFBPs the obligation to check the control and ownership structure of their clients<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

---

<sup>25</sup> *Ibid. supra* fn. 7.

<sup>26</sup> 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.

<sup>27</sup> 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.

<sup>28</sup> Art. 13 (1) (b) Dir 2015/849.

<sup>29</sup> Article 30 (1) Dir 2015/849.

<sup>30</sup> Article 30 (5) Dir 2015/849.

#### 4. Public money legislation

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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup>

---

<sup>31</sup> *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) Dir 2014/24).

<sup>32</sup> 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) Dir 2014/24).

<sup>33</sup> OJ L 182, 29.6.2013, 19-76.

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. Also for the interpretation of the term "person with control" the aforementioned FATF TBO Guidance can be used which also interpret the notion of "control" as including also the indirect control<sup>34</sup>. Hence, a person with control should entail both legal and natural person with direct as well indirect control. In the light of the definition of the direct and indirect ownership under the Directive 2015/849<sup>35</sup>, the definition of control under the Directive 2013/34<sup>36</sup> and the definitions of control and ownership under Regulation 2580/2001, should mean the same as the definition of the ownership and control structure and beneficial ownership interest.

Last but not least, the Partnership Agreement between the EU and the Czech Republic relating to the distribution of EU structural funds requires the disclosure of the ownership structure and beneficial owner(s) from the recipients of EU funds<sup>37</sup> due to the fact that anonymous ownership structures have been widely used as a means of corruption in EU fund distribution<sup>38</sup>. However, a sufficiently detailed and practically usable definition of ownership structures or a person with control does not exist in the Czech Republic, and the relevant Czech public authorities struggle with verification of both the ownership structures and the beneficial owners.<sup>39</sup>

---

<sup>34</sup> Para. 33 (a) and (b) FATF Guidance on Transparency and Beneficial Ownership.

<sup>35</sup> Art. 3 (6) Dir 2015/849.

<sup>36</sup> Art. 22 Dir 2013/34.

<sup>37</sup> Partnership agreement between the EU and the Czech Republic for the programming period 2014–2020, Czech Republic, 202, available at: <https://www.strukturalni-fondy.cz/en/Fondy-EU/2014-2020/Dohoda-o-partnerstvi>

<sup>38</sup> European Commission, EU Anti-corruption Report, Annex 3 – Czech Republic, (COM(2014) 38 final, Issues in focus, 8-9; 'Analysis of anonymous recipients of funds from regional operation programmes for the period 2007 – 2013, in the Czech Republic (with extension of the conclusions to the EU institutions)', (2016) Centrum of Excellence for Good Governance, 17-20; 'Public Money and Corruption Risks, The risks of system political corruption in the management of EU funds and state-owned enterprises in the Czech Republic, Slovakia and Poland', (2013), Frank Bold, 31 and 64.

<sup>39</sup> J. Skuhrovec, 'Svlékání do naha' už je povinné dva roky, jen se nikdo nesvléká', blog Aktuálně.cz, 19 June 2014, available at: <http://blog.aktualne.cz/blogy/jiri-skuhrovec.php?itemid=23160>; J. Skuhrovec, Ministerstvo financí ví, že je porušován zákon. A nic s tím nedělá, blog Aktuálně.cz, 19 June 2015, available at: <http://blog.aktualne.cz/blogy/jiri-skuhrovec.php?itemid=25443>



Yet, the problem of corruption and conflict of interest resulting from the opacity of ownership and control structures of recipients of public contracts and funds as well as the difficulties with verification of their structures and beneficial owners is not peculiar to the Czech Republic. The Report of the World Bank of 2011 entitled “The Puppet Masters” described 150 large corruption cases and almost all of them involved the use of companies with anonymous owners up to the overall amount of USD 50 billion<sup>40</sup>. Similarly, the World Economic Forum reported that “revealing complex corporate schemes and identifying who lies behind them, i.e. identifying their beneficial owners, is considered to be essential to reveal the full extent of the criminal infrastructure and to prevent future criminal activities”.<sup>41</sup> Indeed, 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<sup>42</sup>.

## **5. EU international sanctions and terrorism enforcement: ownership and control**

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.<sup>43</sup> 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

---

<sup>40</sup> 'The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to do About It', (2011) World Bank Publications.

<sup>41</sup> World Economic Forum, 'Organised Crime Enablers' (2013).

<sup>42</sup> The Economist, Corporate Anonymity – Light and wrong, 21 January 2014, 55.

<sup>43</sup> 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) Reg 2001/2580).

indirectly, to, or for the benefit of those persons or entities, as well as providing financial services to them.<sup>44</sup>

Unlike other above-mentioned instruments of EU law, the Regulation 2001/2580 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.<sup>45</sup>

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 list<sup>46</sup> which are usually attached as annexes to the Regulations imposing sanctions on specific states or organisations<sup>47</sup>.

---

<sup>44</sup> Art. 2 (1) (a) Reg 2001/2580.

<sup>45</sup> With respect to control is 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 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) Reg 2001/2580).

<sup>46</sup> 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).

<sup>47</sup> 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](https://eeas.europa.eu/headquarters/headquarters-homepage_en/8442/Consolidated%20list%20of%20sanctions)

## **6. Lack of effectiveness of new rules on beneficial ownership**

The lack of common interpretation will substantively diminish the effectiveness of the identification of the beneficial owner(s) and the beneficial ownership interest in the registers of beneficial owners(s), in particular in situations of indirect ownership, despite the requirements of Directive 2015/849 that the information on beneficial owner(s) and beneficial ownership be adequate, accurate and current;

The lack of interpretation guidance will lead to divergences between identification and evidencing: in certain Member States only identification of ownership structure between the legal person in question and the beneficial owner will be required whereas in other Member States evidence will be obliged to prove the information about the ownership structure. Without knowing which evidence to ask for in certain Member States any document evidencing the ownership interest will suffice, in other Member States only constitutive documents proving the ownership interest will be accepted. These divergences will appear between Member States' registers of beneficial owners, (ii) different types of obliged persons, and (iii) providers of public funds and contracts.

The potential divergences in evidencing of ownership structures will arise both in direct and indirect ownership scenarios. The evidencing divergences will result from two sources: first, it may not necessarily be possible to evidence the ownership interest and its owner by a statement from a public registry; second, in case of plurality of evidencing documents it may not be clear which evidence is the right one to serve as a proof of direct ownership interest: the decisive evidencing document may be the statement from the public registry of the legal person indicating the amount of shareholding interest and its holder, but it does not necessarily have to be so.

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 the those 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.

The described diversity is a result of the lack of harmonisation of evidencing of shareholding interests at the EU level. Directive 2009/101<sup>48</sup> which foresees the disclosure of certain minimum information about companies, such as instruments of constitution, identity of directors, supervisors, capital subscribed, certain financial documents, the registered office<sup>49</sup> etc., does not require at the same time companies to disclose and prove their direct owners. Hence, both the disclosure and evidencing of owners of corporate entities is left at the discretion of Member States' legislation: Member States, in the absence of harmonised rules, adopt their own requirements for disclosure of direct owners of corporate entities which, as was illustrated above, vary significantly from one Member States to another.

---

<sup>48</sup> OJ L 258, 1.10.2009, 11–19.

<sup>49</sup> Art. 2, Dir 2009/101.

As it has been explained above, financial institutions and DNFBPS are obliged to check the control and ownership structure and beneficial owners of their customers who are legal persons, including beneficial owners, and make sure that this information is up-to-date. The problems resulting from the lack of guidance on the definition of control and ownership structures and beneficial owners, the ways of their identification and evidencing hamper the fulfilment of the due diligence obligations regarding ownership structures and beneficial owners by financial institutions and designated non-financial bodies and professions.

*“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 fulfil this requirement, finding it difficult to obtain the information from the company or through other means”.<sup>50</sup>*

The authorities keeping the registers of beneficial owners and the legal persons obliged to register their beneficial owners in these registers as well as providers of public funds and contracts will experience analogous problems with the disclosure, evidencing and verification of control and ownership structures and beneficial owners, or the persons with direct and indirect persons over the beneficiary respectively. Compliance with the obligation of keeping adequate, accurate and current information about beneficial owner(s) and beneficial ownership interest for authorities charged with keeping the beneficial ownership registers will prove even more challenging than in the situations of indirect ownership reaching to countries outside the EU. A number of non-EU Member States make sure that their company registers do not publish or even require from companies the information about their shareholders (owners). Shareholders’ (owners’) anonymity is the second main feature of their attractiveness next to zero percent corporate tax of states called tax havens or non-cooperative tax jurisdictions<sup>51</sup>. The problem of evidencing of ownership interests in legal

---

<sup>50</sup> Transparency & Trust – Enhanced Transparency of Company Beneficial Ownership, Department for Business, Innovation & Skills, Impact Assessment, 25 June 2014, 11.

<sup>51</sup> P. Walkowski, 'The problem of mounting income inequalities in the world vis-a-vis the phenomenon of harmful tax competition. The ICIJ tracking down the greatest financial scandals of the 21st century', (2016) 2 Przegląd Politologiczny, Issue 2, 140.

persons incorporated in third countries will further exacerbate the issue of lack of effectiveness of information about beneficial owners.

The 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).

Unfortunately, neither the joining of company registers<sup>52</sup> or the envisaged interconnection of registers of beneficial owners will not 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.

## **7. Inefficiency and administrative burden of the new rules**

The lack of common interpretation of the notions relating to beneficial ownership will also lead to the unnecessary duplication or even multiplication of information about ownership

---

<sup>52</sup> Directive 2012/17 as regards the interconnection of central, commercial and companies registers, OJ L 156, 16.6.2012, 1–9.

structures and beneficial owners in the national registers of beneficial owners. Since the obligation to register their beneficial owners will fall upon all legal persons incorporated in all Member States, a group of companies with parent and subsidiary companies in different Member States will have to register, in each Member State where they are present, their beneficial owners and beneficial ownership interest (ownership and control structure).

In relation to the given example of an ownership structure, this would mean that company in Member State A would have to submit to the company registry in this Member State information on parent companies in Member State B, Member State C and non-Member State D and beneficial owners Persons X and Y; similarly, the parent company in Member State B (of the company in Member State A) would have to submit to the company registry in Member State B information on its parent companies in Member State C and non-Member State D as well as information about the beneficial owners Persons X and Y. Finally, the parent company in Member State C (of the company in Member State B) would have to submit to the company registry in Member State C information on its parent company in a non-EU Member State D as well as information about the beneficial owners Persons X and Y. Thus, company registries in Member States A, B and C will all register the Persons X and Y as beneficial owners and the beneficial ownership interests – the beneficial ownership interest in company in Member State A (i.e. identification of companies in Member States B, C and D and the linking interests between them) in the registry in Member State A, the beneficial ownership interest in company in Member State B (i.e. identification of companies in Member States C and D and the linking interests between them) in the registry in Member State B and the beneficial ownership interest in company in Member State C (i.e. identification of company in Member States D and the linking interests between this company and beneficial owners) in the registry in Member State C.

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 by 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 to 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 proposed<sup>53</sup>, 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 a company in non-Member State D sells its ownership interest in a company in Member State C, three parallel applications registering this change will have to be done in registries in Member States A, B and C. The same problems/issues will arise in a purely national context with a decentralised management of companies' 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.

## **8. Conclusion: The need for a common EU interpretative guidance**

The joining of registers of beneficial owners will not provide for a remedy either to the lack of effectiveness problem or, in case of more complex, in particular cross-border ownership structures, the problem of multiple registration of changes in the ownership structure or

---

<sup>53</sup> 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).



beneficial owners. To resolve these problems, before joining the registers, beneficial ownership registers, a common EU-wide guidance as to how to define, identify, evidence and update the beneficial ownership interest/control and ownership structures should be issued.

Apart from contributing to the solution of the effectiveness problem and administrative burden problem, three further reasons militate for the elaboration of a guidance document defining, identifying and evidencing the beneficial ownership interests, that is control and ownership structures of legal persons: first, there is a clear political demand for cracking-down on terrorist financing<sup>54</sup>, which can be performed through anonymised ownership structures<sup>55</sup>; second, there is a similar strong demand for making the information in registers of beneficial owners very precise and of high quality by tax authorities<sup>56</sup> since this information is crucial in determining the effective tax rates of multinational companies and in preventing and pursuing tax avoidance practices<sup>57</sup>; third, the proposed complete opening of the access of citizens to the registers of beneficial owners will create a pressure on the quality of information contained in the beneficial ownership registers which would be better ensured with a common guidance.

Given the circumstances of the adoption, neither an impact assessment of the consequences of the adoption of new obligations under the fourth Antimoney Laundering Directive were made nor was the technical feasibility of implementation thoroughly thought through. The practical implications and difficulties are however now coming to the surface when the registers of beneficial owners have to be implemented.

---

<sup>54</sup> Communication of the European Commission on an Action Plan for strengthening the fight against terrorist financing, 2 February 2016, COM(2016)050 final

<sup>55</sup> 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), 5 July 2016, 2-3.

<sup>56</sup> Communication of the European Commission on further measures to enhance transparency and the fight against tax evasion and avoidance, 5 July 2016, COM (2016) 0451 final.

<sup>57</sup> E. D. Kleinbard, 'Stateless Income', (2011) 11 Florida Tax Review, 699; OECD/G20 Base Erosion and Profit Shifting Project Action 13: Guidance on the Implementation of Transfer Pricing Documentation and Country-by-Country Reporting, (2015).