

Registration of UBOs - why and how?

Companies' obligation to define their beneficial owners and the state's inability to instruct the obligated persons.

Following the Money Laundering and Terrorist Financing Prevention Act (hereinafter the "MLTFPA") that is implementing the so-called Fifth Money Laundry Directive, all companies must disclose their beneficial owners. The deadline for submitting this information was 31 October 2018.

The rules are related to the implementation of a new standards for international money laundering and terrorist financing prevention and their transposition into European Union law. In short, the idea of the legislator is: if it is more transparent who owns what company, it would be more transparent to understand what are "real" business transactions and what could be considered money laundry, i.e. money earned from criminal activities or the black economy being transferred into the normal business life and the track is lost where the money derives from.

The Estonian Ministry of Finance has issued instructions on how to submit information regarding beneficial owners and has also managed to update them several times within the last couple of weeks creating a lot of confusion and stress among company managers and lawyers.

Who is a beneficial owner? Which information must be disclosed and by whom?

In the case of companies, the beneficial owner is the physical person who ultimately owns or controls the company through direct or indirect ownership. Direct ownership is a way of exercising control whereby the person holds a shareholding of 25 percent plus one share, or an ownership interest of more than 25 percent in a company. Indirect ownership is a manner of exercising control whereby a company that is under the control of a natural person holds, or multiple companies that are under the control of the same natural person hold, a shareholding of 25 percent plus one share, or an ownership interest of more than 25 percent in a company. In short, a person who can control a company is the UBO of that company. Several persons can be UBOs of the same company.

It is the company, i.e. the company's management board, which is responsible for registering the company's UBOs. The company must submit the following information about the beneficial owner/s through the Commercial Register's data system: the UBO's name, ID code or birthday and country of residence, as well as data regarding the way in which the person exercises control over the company.

Companies (i.e. the management board) must document and store data about all measures that they have taken to identify the beneficial owners. If no beneficial owners can be identified and all measures to do so have been implemented, the company must name the highest member of its management organ as the beneficial owner. So, if the management board cannot find out who the owners of the company are, they should register the board of the company highest in the hierarchy of the company group. This is also what listed companies need to do, as they have many shareholders that also change constantly. If any information about the beneficial owners changes or is incorrect, the management board must amend the registration within 30 days. If the registered UBOs remain unchanged for the duration of a full financial year, the management board need only confirm the accuracy of the information when they submit the annual report.

Once the information about the beneficial owners has been submitted to the Commercial Register, it will automatically become visible on the Commercial Register's website and be available to everyone for a fee of 1 EUR.

Who does not have to submit UBO data?

Apartment associations, building associations, companies listed on the regulated market, and foundations with no economic activity are not obligated to submit any UBO data in Estonia.

In situations where a company registered in Estonia is not listed on the regulated market, but its major shareholder is, the question arises whether it is necessary to define the beneficial owner or not.

Initially, the Ministry of Finance gave instructions that if a company registered in Estonia has a listed parent company, the members of the controlling body of the listed company, i.e. the board, or the supervisory board, should be indicated as the UBOs. It is important to note that shortly before the deadline for submitting the data, the Ministry of Finance supplemented its guidelines so that a member of the controlling body of the listed company must be named the beneficial owner only in a situation where there are no natural persons with a holding of more than 25%. Hopefully this information has also been sent to the companies affected since many of them have surely already submitted the data to the register based on the information they first received.

To whom must the information about beneficial owners be submitted?

All shareholders of all companies are obligated to inform the company's management board about the beneficial owners. The management board in its turn shall forward this information to the Estonian Commercial Register, where the data will be made public. The management board has two options for submitting the data:

- (i) electronically through the company registration portal; or
- (ii) through an Estonian notary public.

The Ministry of Finance only recently gave instructions that a board member cannot authorize anyone else to submit the data of UBOs. It is regrettable that this kind of information is given to entrepreneurs even though the Estonian Commercial Code states that the management board of a company does not have to be located in Estonia, and it is not mandatory to have an Estonian ID card or residency card, and it is completely legal to authorize another person to perform this action.

A week and a half before the deadline for the submission of the data, the Ministry of Finance changed its position again, and it is now possible for other persons to notify the Commercial Register of beneficial owners through Estonian notaries and under a power of attorney. In the future, per good governance practice, the State should be able to issue appropriate guidelines for similar amendments to a law sooner.

Consequences of failure to submit data

The companies were given 60 days after the new rules entered into force to submit the data about its beneficial owners to the Commercial Register. Companies had to submit this data by 31 October 2018. The MLTFPA provides fines for intentional submission of false data or failure to submit data. For the failure to register and store data about beneficial owners, a management board member can be fined up to 1,200 EUR. For the legal entity, the fine can be up to 32,000 EUR. These sanctions for failure to submit data will come into force on 1 January 2019.

This means that companies have until the end of this year to register their beneficial owners without getting fined. Since the Ministry of Finance has repeatedly changed their opinions and instructions, and entrepreneurs keep asking new questions about complying with the law, the actual implementation of the law is still an ongoing process. At the moment, (6 November 2018) about half of all registered legal entities have submitted their data about UBOs to the Commercial Register.

Rules are implemented differently in EU countries

Many multinational companies in Estonia have difficulties with the Estonian UBO registration obligation since it differs from other countries' rules. All EU countries have based their UBO registration obligation on the very same EU Directive. However, countries have implemented the EU Directive with some differences.

In Sweden, for example, a limited liability company (Sw: aktiebolag, AB) must register a) any person who has more than 25% control over the company (through direct or indirect ownership), and b) any person who has the right to appoint or call back more than half of the company's board members. In case a company has for example 10 owners, and neither of them owns more than 25%, and neither of them has the right to appoint or call back more than half of the board members, this company has no UBOs and no obligation to register any UBOs.



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