Register of beneficial owners:

Transposition of the 4th and the 5th EU AML Directives into Luxembourg law

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The European legislation on the fight against money laundering and the terrorist activities ("AML") has seen a number of rapid developments since the first directive in this respect back in the early 90's[1]. The evolution of the AML-legislation has been in an adaptive mode, i.e. by trying to take into account the realities of a modern world (creative methods of criminals to circumvent the AML legislation (ex. "Global Laundromat" scandal), as well as the progress in information technology (ex. use of cryptocurrencies by criminals), etc.).

One of the most recent (and more drastic) proposals by the EU Commission has been the creation of registers of ultimate beneficial owners (the "**BO**") of legal entities that are registered within the Member States (the "**RBO**"). The ultimate goal of such legislation is to further enhance the transparency and pierce the corporate veil, thereby preventing criminals and/or terrorists from hiding their identity behind a corporate structure.

The requirement for the EU Member States to establish RBOs stems from Article 30 of the EU Directive 2015/849[2] (the "**4th AML Directive**"). Moreover, additional criteria have been introduced by the EU Directive 2018/843[3] (the "**5th AML Directive**") that amends the 4th AML Directive.

In Luxembourg, the transposition of the requirement to create an RBO has been introduced by a draft bill of law No. 7217 (the "**Draft Law**"). Since its introduction on 6 December 2017, the Draft Law has seen a number of changes and extensive comments from various governmental and self-regulated bodies. The initial proposal of the Draft Law has undergone two extensive amendments. The first amendment, published on 13 July 2018, has incorporated a number of comments brought forward by various involved parties. The second amendment was presented on 10 October 2018 and primarily addresses the entering into force of the 5th AML Directive, as well as some of the additional comments that were made by the involved parties on the first amendment of the Draft Law.

Finally, the Draft Law has also undergone some minor changes (primarily pursuant to the comment of the *Conseil d'Etat*), prior to it being presented to the Luxembourg Parliament for a vote that took place on 18 December 2018. The Law has been published in the Official Gazette (*Mémorial*) on 15 January 2019 and, in accordance with Article 29 of the Law, entered into force on 1 March 2019 (the "**Law**"). The Law also provides for a transitory period (under Article 27), whereby legal entities that fall within the scope of the Law will have six months, i.e. until 31 August 2019, to comply with the requirements of the Law.

In view of the impact of the Law on the financial industry and the sensitive nature of the subject matter, and to provide a glimpse of what the practitioners may expect as to the general functioning of such register in Luxembourg in the current state of the Law, this article addresses the following elements: (i) the scope of the Law, (ii) functioning and access to the RBO, (iii) sanctions proposed by the Law and (iv) the potential difficulties that the market practitioners may face when complying with the requirements of the Law.

Scope of the Law

The Law provides that it applies to all registered entities (*entités immatriculées*) within the meaning of Article 1, point 2 to 15 of the Luxembourg law of 19 December 2002[4] (the "**RCS Law**"). This basically means that all Luxembourg commercial companies would fall within the scope of the Law (the "**Registered Entities**"). Tradespeople (*commerçants*), i.e. natural persons that perform business activities in their proper name would for obvious reasons not fall within the scope of the proposed law. Under the original proposal of the Draft Law (that is prior to the 5th AML Directive entering into force), it was contemplated to exclude from the scope of application of the Law common investment funds (*fonds commun de placement*) and companies listed on regulated markets. The Law however no longer contains such exclusion, despite major comments and recommendations made by the Luxembourg Bar Association (*Avis du conseil de l'ordre du barreau de Luxembourg*) in this respect.

Functioning of the RBO

The RBO is created under the authority of the Ministry of Justice and is officially named "*Registre des bénéficiaires effectifs*" (*RBE*). The originally proposed title of "*REBECO*" has not been retained.

The Law is also supplemented by a Grand Ducal regulation that has been published on 19 February 2019[5] (the "**Regulation**"). The Regulation does not *per se* add any clarifications to the Law but rather addresses the technical aspects of the functioning of the RBO. In particular, it covers the inscription process, how the access to the information in the RBO would take place and the costs and methods of payment for filing and extracting the information to and from the RBO.

The Law provides that the RBO will be managed by the Luxembourg Business Registers. This means that the Registered Entities would be able to submit the information on their beneficial owner(s) to the RBO and such information will be available to the public for consultation, in the form of extracts or otherwise. The data base of the RBO would legally belong to the Luxembourg State[6]. The Luxembourg Business Registers (the "**LBR**") have published a Circular LBR 19/01 on 25 February 2019 which provides a brief summary of the key elements of the Law and also provides additional practical details as to the functioning of the RBO. In particular, the LBR states that its role is to collect the information and make it accessible to the public and to professional and national authorities. A dedicated link to the RBO is already available on the website of the LBR, however the aforementioned circular clarifies that the information filed with the RBO will be available for consultation as of 1 September 2019.

The filing of the information to the RBO would be made by a Registered Entity or its representatives (*mandataires*). In practice, this would mean the board members of the Registered Entity, domiciliation agents and/or lawyers and the notaries (as part of incorporation and corporate amendments of such entities). Such filings will be made by electronic means. In this respect, the information on the BOs that has to be filed with the RBO is the following (the "**BO Information**"):
- Name;
- Nationality;
- Date and place of birth;
- Country of residence;
- Precise private or professional address;
- Identification number;
- Nature and the extent of interest held.

To support the above BO Information, companies would also need to provide supporting documents in this respect (*pièces justificatives*). The Regulation provides in Articles 5 that it would be necessary to provide official documents allowing to establish the identity of a BO. Such documents would have to be translated into French, German or Luxembourgish if such documents are not drawn with Latin characters. Entities listed on regulated markets would be required to provide a certificate or a confirmation of such listing from a respective regulated market.

In addition to the requirement to file the BO Information, the companies that fall within the scope of the Law are required to obtain and hold (i) adequate, (ii) exact and (iii) up-to-date information on the BOs, along with the supporting documents in this respect at their registered offices.

The up-to-date element of the BO Information requires the Registered Entities to file any amendments in the RBO as to the BO Information within one month as from the moment such Registered Entity has learned or could have learned of an event that would require the amendment of initially filed information. The BOs in turn also have an obligation to provide all the necessary information to a Registered Entity so that the latter can comply with the applicable requirements of the Law.

The Law provides that the BO Information will be held in the RBO for five years after the date of removal of a Registered Entity from the LBR. The supporting documents, provided to the RBO as part of the filing, will be also kept for five years.

Following a dissolution of a Registered Entity and its subsequent removal from the LBR, such Registered Entity would have an obligation under the Law to conserve the information on the BO and the supporting documents in that respect for five years as from the date of its removal from the LBR. Moreover, such Registered Entity would have to designate a place where such information and documents will be stored and publish with the LBR the information on such designated place.

There is a risk that this could in practice potentially put an additional burden on the domiciliation agents and other service providers in Luxembourg and could, as a result, increase the costs for clients.

Access to the RBO

The RBO is generally accessible to the public. Restrictions however apply as to the type of BO Information that would be available to the public. National authorities would have a total access to the BO Information. All other persons/entities would have access to the BO Information, excluding information on the private/professional address and an ID number of a respective BO.

The Law provides for a possibility for the Registered Entities or BOs to make a request to limit the access to the BO Information only to the national authorities, credit institutions, bailiffs and notaries in their capacity as public officers. The request to limit such access should be justified. The Law lists exhaustingly such reasons to exposures of a BO to a disproportionate risk, risk of fraud, abduction, blackmailing, extortion, harassment, violence or intimidation or if a BO is a minor or has some handicap/incapacity.

The officer (*gestionnaire*) of the RBO will make a decision as to the restriction of access to the BO Information. If such limitation is granted, the Law provides that it should be for the duration of the specific circumstances justifying the limitation and in any case no longer than three years. The restriction can however be renewed after 3 years, provided that such renewal request is equally motivated.

Criminal Sanctions

The Law provides for criminal sanctions in the forms of fines. The fines range in the amounts of EUR 1,250 to EUR 1,250,000. Such sanctions can generally be divided into two parts, (i) the sanctions that are applicable to the Registered Entities and (ii) the sanctions applicable to the BOs.

The sanctions applicable to the Registered Entities can be further divided into four different elements that correspond to a specific non-compliance of the obligations provided for by the Law:
a) Failure to file the information within the RBO (this applies to the initial filings as well as any subsequent modification requirements thereto) within the prescribed time frame of one month or fifteen days as from the final court judgement in the event of a litigation contesting the inscription within the RBO;
b) Deliberately filing inexact, incomplete or non-up-to-date BO Information;
c) Failure to obtain or keep the BO Information at the registered office of a Registered Entity;
d) Deliberately providing the national authorities or professionals with inexact or non-up-to-date BO Information.

The sanction applicable to the BOs relate to a failure to comply with the obligations provided under Article 17.1 of the Law, which basically require a BO to provide information to the Registered Entity so that it can comply with the requirements of the Law (i.e. BO Information for the initial filing and any subsequent amendments thereto).

The criminal sanctions on the BOs have an extraterritorial characteristic and it would be interesting to see how and if these would be implemented in practice. It is conceivable that BOs that are involved in highly complex corporate structures would not have a reflex to notify a Registered Entity in Luxembourg should his or her nationality, country of residence, address or a stake holding changes, thereby triggering criminal sanctions in this respect.

Potential Difficulties for the Practitioners

The afore mentioned introduction of the Draft Law and its first amendment have drawn a considerable amount of comments, in particular from the *Conseil d'Etat* and the Luxembourg Bar Association. These have partially been incorporated into the Law, however a number of key elements remain open and could potentially be problematic for the market practitioners without additional amendments and/or clarifications to the Law or the Grand-Ducal regulation.

a) Scope of the Law

While it is clear from the Law that entities listed on a regulated stock market platform would not need to provide information on their BO(s), Registered Entities whose shares are listed on other stock market platforms (such as for instance the Euro MTF or Securities Official List) would fall within the scope of the Law. However, as rightfully noted by the Luxembourg Bar Association and the Luxembourg Chamber of Commerce in their comments, such Registered Entities would have no technical nor legal means to identify their BOs. In general, as a rule of thumb, any legal entity whose shares are subject to a clearing system (even if not admitted on a stock exchange) would equally not be capable to comply with the provisions of the Law.

It is also rather surprising that investment funds (retail and alternative alike), a backbone of the Luxembourg financial industry, have not been excluded from the scope of the Law. While it is highly unlikely for a natural person to hold more than 25% the units issued by a retail investment fund, alternative funds on the other hand primarily have institutional and/or semi-governmental investors (for example pension funds). Therefore, the risk of money laundering in this respect is extremely low. Moreover, all the "know your customer" (KYC) procedures of the investors are made by either third party service providers or the management companies themselves, and, in each case, such entities are regulated and supervised by a respective competent national regulatory authority. From a practical perspective, it is hard to see what information would have to be provided to the RBO on an alternative investment fund where, for instance, more than 25% of shares are held by a German pension scheme?

b) BO Information

Further clarification would in our view be required with regard to the BO Information. The Law provides that a private or a professional address of a BO would have to be provided to the RBO. In this respect a question can be asked as to what exactly constitutes a professional address. It may well be that a BO has a mandate on a number of companies that are direct or indirect parent company(ies) of the Registered Entity. Would an address of a registered office of one of such parent company be considered as a professional address of a BO?

The calculation of the number of stakes held by a BO in an indirect shareholding structure can also be very difficult to establish. The *Conseil d'Etat* for that matter has rightfully questioned this aspect in its comments. To the extent that the Registered Entities have an obligation under the Law to provide, among others, exact information on their BOs, calculations in this respect may provide divergent results, and would therefore require detailed clarifications at the risk for the Registered Entities of being subjected to potential criminal sanctions. Moreover, it may be difficult to determine and document the extent of interest and differentiate the scenarios whereby a BO either owns a Registered Entity (i.e. holds more than 25%) and/or controls it (i.e. voting rights). In other words Registered Entities should be able to differentiate the economic control from the political control of a BO when filing the BO Information in the RBO.

Conclusion

The Law has transposed rather disruptive concepts with a view of enhancing transparency and ultimately piercing the corporate veil. The merits and the scope of such attempts are however debatable on certain points and will raise practical issues that should be clarified. The practitioners will nevertheless have to take note of the new requirements and make the necessary adjustments and preparations in this respect. In particular, the corporate services providers would be most directly impacted by the Law. More importantly, BOs of the existing Registered Entities and any future clients that wish to structure their transactions via Luxembourg should be informed in advance of the new requirements of the Law.

1) Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.
2) Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.
3) Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 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 Directives 2009/138/EC and 2013/36/EU.
4) La loi du 19 décembre 2002 concernant le registre de commerce and des sociétés ainsi que la comptabilité et les comptes annuels des entreprises, telle que modifiée.
5) Règlement grand-ducal du 15 février 2019 relatif aux modalités d'inscription, de paiement des frais administratifs ainsi qu'à l'accès aux informations inscrites au Registre des bénéficiaires effectives.
6) Report of the Justice Commission to the Draft Law, p. 7, see also LBR Circular LBR 19/01, p. 1.