
Identification of the beneficial owner of Italian companies

What you need to know

As it is known, **by 11 December 2023**, all “enterprises having legal personality that must be registered in the Companies Register” (companies, legal persons, funds, trusts, trust companies, etc.) shall communicate their beneficial owner/s to the Companies Register pursuant to Article 3, paragraph (6) of the Decree of the Ministry of Economy and Finance of 11 March 2022, No. 55, in order to be registered in the Register of Beneficial Owners. The correct fulfilment of this obligation entails a series of in-depth analysis and evaluations that can prove to be quite complicated, and any mistakes may bring several implications and possible risks of sanctions and liabilities, including criminal sanctions. We have summarized below some fundamental information for correctly complying with these obligations.

It is crucial to highlight the international scope of the information on beneficial owners. Once the relevant data on beneficial owners are recorded in the Register, such information will be transmitted to the Beneficial Ownership Registers Interconnection System, known as “BORIS”, developed by the European Union. This system provides access to details on the beneficial ownership of companies, legal entities, trusts and legal institutions registered with the national registers of EU member states and beyond.

How is the beneficial owner identified?

The beneficial owner is the natural person on whose behalf an enterprise ultimately carries out its business, who is generally identified in the person at the top of the ownership chain, or, where this is not identifiable based on the criteria set forth by law, the persons who are vested with representation and direction powers in the relevant entity. However, the identification process of the beneficial owner is not always simple and straightforward. The difficulty increases, for example, where there are entities along the ownership chain such as funds, fiduciary companies, trusts, consortia, partnerships, or foreign entities.

Moreover, in the Italian market practice, it is not yet clear whether, once the entities holding more than 25% of the relevant enterprise have been identified, the beneficial owner must be identified based on the criterion of control (more than 50%) or of participation in excess of 25% in the entire ownership chain (that is the criterion prevalently used in the Italian banking system).

The difference is quite significant since, in the latter case, every natural person who directly or indirectly holds more than 25% (per cent) in each company along the ownership chain shall be indicated as a beneficial owner, and therefore, in such case the residual criterion whereby the beneficial owners would be the directors of the entity would not apply.

Is the beneficial owner for anti-money laundering purposes the same as the beneficial owner for tax purposes?

The OECD had already introduced the concept of beneficial owner in the 1977 double taxation model convention. As a consequence, a considerable amount of audit activity has been carried out by national and international tax authorities. It seems possible that the recent work on "Pillar II" and "Shell Companies" might give new impetus not only to the doctrinal debate but, also, to the consequent audit activities, which could lead to possible disputes in the event of a mismatch between the person reported as the beneficial owner and the 'beneficial owner' for tax purposes.

Who is responsible for the communication?

The burden of communication and the relevant **liability** lay with:

- (a) the **directors**, for companies with legal personality;
- (b) the **founder**, if alive, or **the persons entrusted with the representation and direction** for private legal persons;
- (c) the **trustee**, for **trusts and related legal institutions**.

In case of doubt, it will be the **directors** and other persons mentioned above who shall **prove that they have implemented all the necessary measures and procedures** for the purposes of the correct identification of the beneficial owner. If a shareholder unreasonably refuses to provide the information necessary to identify the beneficial owner, or provides fraudulent information, his conduct will affect the exercise of the voting rights, that the director will have to deal with.

Is the communication sufficient?

In addition to communication to the Register, obliged entities shall follow appropriate processes not only for collecting and storing information on their beneficial owner/s, but also for periodically updating it.

What are the consequences of the erroneous or omitted communication of the beneficial owner?

The non fulfilment or delay in fulfilling the reporting obligations will result in a **fine**, which may amount to up to EUR 1,032.00. Penalties of even criminal relevance may also be incurred in the event of false or erroneous declarations.

In this respect, it must be noted that the entities who are subject to KYC identification duties for AML purposes (such as banks, investment companies, insurance undertakings etc.) must also report to the Register any inconsistency between the information they have acquired in fulfilling such duties and those appearing in the Register.

Given the complexity and relevance of the subject matter, CMS provides clients with a

beneficial owner verification (and reporting) service through its dedicated helpdesk, composed of professionals specialised in the AML field.

If you need support in identifying your entity's beneficial owner, please contact us at the helpdesktitolareeffettivo@cms-aacs.com.

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