International Comparative Legal Guides

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Global Transparency Trends and Beneficial Ownership Disclosure


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1 Introduction

One of the most pressing corporate governance issues today is the growing trend towards increased corporate transparency. Public and private companies around the world are being mandated to identify and disclose the details of their ultimate beneficial owners – the individuals who ultimately own or control them.

This movement towards transparency has its recent origins in international standards adopted primarily to combat cross-border money laundering, corruption and financial crime. Corporate transparency has also made its way into mainstream discourse. Data leaks such as the Panama Papers in 2016 and the Paradise Papers in 2017 have thrown a spotlight on complex corporate structures, the identity of "true" owners and general tax avoidance. Today, legislators and regulators have renewed their focus on corporate transparency, extending their reach beyond anti-money laundering measures solely applicable to the financial sector.

One key measure introduced by various countries is the requirement to prepare and maintain a register identifying the "owners" of the company. Specific reporting and disclosure requirements vary by jurisdiction, with some countries requiring the register to be publicly filed and others allowing for the register to be privately held, but accessible to government authorities. We will take a closer look at these requirements in key jurisdictions and discuss practical compliance issues, before addressing what may be on the horizon in the near future.

2 In-Depth Look at Key Jurisdictions

2.1 The EU Directive

The *Fourth Money Laundering Directive* ((EU) 2015/849) as supplemented and amended by the *Fifth Money Laundering Directive* ((EU) 2018/843) (together, the "**EU Directive**") came into force in the European Union in 2017. The EU Directive leads the largest multinational effort to harmonise measures against money laundering and financial crime across Member States. Article 30, in particular, requires Member States to ensure that companies incorporated within their jurisdiction obtain and hold adequate, accurate and current information on their beneficial owners, including details of the beneficial interests held. Such information should be held in a central register (in the relevant Member State) and accessible to specified authorities, firms carrying out customer due diligence and any other person or organisation able to demonstrate a legitimate interest. The EU Directive also provides that mechanisms to verify that such information is adequate, accurate and current should be put in place and breaches should be subject to effective, proportionate and dissuasive measures or sanctions.

Although the EU Directive applies to all Member States, as a minimum harmonising directive, each Member State must adopt national implementing legislation that is equally or more stringent than the EU Directive. The majority of Member States have yet to implement adequate centralised registers and for those countries that have implemented registers, the regime looks slightly different in each jurisdiction.

2.2 France (private register)

The EU Directive was transposed into French law by *Ordinance n° 2016-1635* in December 2016, clarified by the *Decree n° 2017-1094* in June 2017 and re-enforced by *Decree n° 2020-118* in February 2020. Companies and other entities registered with the Trade and Companies Registry (*Registre du Commerce et des Sociétés*) must obtain and maintain up-to-date and accurate information on their ultimate beneficial owners ("**UBOs**"). This information must then be sent to the court clerk office.

(a) Entities in scope

The obligation to obtain and maintain information on UBOs applies to: (i) all civil and commercial companies whose registered office is located in France; (ii) economic interest groups with their registered office located in France; (iii) foreign commercial companies with an establishment in France; and (iv) other legal entities whose registration is provided for by law or regulatory provisions (e.g. associations issuing bonds). Companies whose securities are admitted to trading on a regulated market such as Euronext Paris are exempt.

(b) Test for ownership

A UBO is defined as a natural person who: (i) directly or indirectly holds more than 25% of the share capital or voting rights company; or (ii) exercises, by any and all means, a power of control over the company's management, administrative or executive bodies or over the general meeting of shareholders. Since the two criteria are alternative, it is possible for one individual to be a UBO by virtue of his/her shareholding and for another individual to be a UBO by virtue of his/her power or control. In such a case, both individuals would need to be declared as UBOs. As the test captures both direct and indirect control, in practice, the entire chain of control must be analysed from the French entity and up to the ultimate natural person(s) who indirectly control(s) the entity.

(c) Key obligations

Applicable companies must obtain and keep accurate and up-to-date information on its UBOs. Companies must file a form with the Trade and Companies Registry. The form details

include name, date and place of birth, nationality, place of residence, terms/means of the control exercised over the company, and date on which beneficial ownership began for each UBO. While the information submitted to the Trade and Companies Registry is not generally publicly available, the register is available to the French financial intelligence desk, tax authorities, customs authorities, judicial judges, police officers, and certain other public authorities. In the absence of a UBO, applicable companies can submit a declaration stating that the legal representative of the company is the UBO; this is an exception solely for entities that do not have a UBO. Updates to UBO information must be filed regularly with the Trade and Companies Registry and within 30 days of any act or event that changes the beneficial owner information filed previously.

In the event of non-compliance, the president of the Commercial Court, upon its own initiative or upon request of the prosecutor or any person demonstrating a legitimate interest, may order the company to produce and file the information document under financial compulsion. In addition, a fine and a sentence of imprisonment of six months may be incurred for non-compliance or for filing inaccurate or incomplete information.

2.3 United Kingdom (public register)

Since April 2016, most companies incorporated in England and Wales have been required to keep a register of "people with significant control" ("**PSCs**") and to file a copy of same with Companies House, the local registrar. These requirements were first introduced in the *Companies Act 2006* and the *Register of People with Significant Control Regulations 2016*, before being extended to comply with the EU Directive through the *Information about People with Significant Control (Amendment) Regulations 2017*. Each company's register is public and there is no charge to access the register.

(a) Entities in scope

Generally, the disclosure requirements capture private companies limited by shares or guarantee, public companies limited by shares (unless listed on a regulated market in a European Economic Area state), unlimited companies, unregistered companies, limited liability partnerships, *societas europaea*, Scottish limited partnerships, and Scottish general partnerships (where each of the partners is a corporate entity).

(b) Test for ownership

Broadly, PSCs are those who: (i) directly or indirectly own more than 25% of a company's shares; (ii) directly or indirectly control more than 25% of members' voting rights; (iii) have the direct or indirect right to appoint or remove a majority of the board of directors; or (iv) otherwise exercise, or have the right to exercise, "significant influence or control". As well as including natural persons, a PSC can include certain specified bodies or entities. Non-statutory guidance has been published by the Department for Business, Innovation and Skills to assist with interpretation of these conditions.

(c) Key obligations

Entities in scope are generally required to prepare and maintain their own register and must take reasonable steps to identify its PSCs. In addition to the nature of control and corresponding date, personal details of PSCs such as their name, residential address, nationality, and date of birth must be disclosed. The register must be filed with Companies House and be kept up to date with any updates to the PSC register being made within 14 days of a change and Companies House notified of the change within 28 days of same.

Some information for PSCs (such as residential addresses and full dates of birth) are not part of the public register, but are shared with specified public authorities (e.g. the Bank of England and the Financial Conduct Authority) and credit reference agencies. Entities can also apply to have PSC information withheld from the public register where disclosure would put a person at risk of violence or intimidation. Protection must be applied for and must meet certain statutory criteria to be awarded.

Non-compliance is an offence punishable by a fine or up to two years' imprisonment, or both. Entities must comply with the regime and all persons who are PSCs must provide the required information or risk being convicted. There is no defence for an inadvertent or minor breach of the provisions. Those who fail to comply with their disclosure duties also risk their interest in the entity becoming restricted. A "restrictions notice" prevents a PSC from exercising any rights attaching to the interest in question thereby preventing the person from selling, transferring or receiving any benefit from their interest in the entity until the entity obtains the information that it needs and lifts the restrictions.

At present, the main implications of the United Kingdom's withdrawal from the European Union are expected to only impact the above requirements for *societas europaea*.

2.4 Canada (private register)

By way of background, Canadian corporations can be governed under the federal corporate statute in Canada, the *Canada Business Corporations Act* ("**CBCA**"), or under the corporate statute in any province or territory in Canada. Corporations organised and existing under the CBCA are required to prepare and maintain a register of individuals with significant control ("**ISCs**") since June 2019.

(a) Entities in scope

In general, all CBCA corporations that are not public companies (i.e. "reporting issuers") or corporations listed on a designated stock exchange (as defined by the *Income Tax Act* (Canada)) must prepare and maintain a register of ISCs. While this requirement currently only applies to corporations governed under the CBCA and the *Business Corporations Act* (British Columbia), similar legislation is expected to come into force for other jurisdictions in Canada.

(b) Test for ownership

ISCs are individuals who meet either of the following tests: (i) the 25% interest test; or (ii) the influence/control in fact test. Under the 25% interest test, an individual is an ISC if he/she has interests/rights in a number of shares that either: (a) carry 25% or more of all voting rights attaching to the corporation's outstanding voting shares; or (b) have a fair market value equal to 25% or more of the aggregate fair market value of the corporation's outstanding shares. Interests can take the form of registered ownership, beneficial ownership or direct or indirect control or direction. In addition, where interests are jointly held or individuals act jointly or in concert, all such joint holders or individuals will generally be considered ISCs. Under the influence/control in fact test, an individual is an ISC if he or she has direct or indirect influence that, if exercised, would give him/her control in fact of the corporation.

(c) Key obligations

Generally, corporations must identify their ISCs, confirm their information, and keep it up to date. Shareholders have an obligation to provide accurate and complete information in response

to any request from the corporation and the ISC Register should record the steps the corporation took to identify its ISCs. Information required includes their name, date of birth, residential address, and jurisdiction of residence for tax purposes. An explanation of why the person is considered an ISC (including a description of his or her interests and rights in the corporation's shares) must also be provided. The ISC Register must be kept at the registered office of the corporation or any other place in Canada that the board of directors designates.

Corporations are required to take reasonable steps to update the ISC Register, and ensure that it is accurate and complete, at least once every financial year. If a corporation becomes aware of a change affecting the ISC Register, the update should be recorded within 15 days of the corporation becoming aware of such information. If requested, the corporation is required to disclose the ISC Register to shareholders and creditors of the corporation and Corporations Canada. Investigative bodies that are allowed to request information include any police force and the Canada Revenue Agency. The ISC Register is not, however, otherwise publicly available.

While it remains to be seen how Corporations Canada will enforce the ISC Register requirements or audit corporations, the CBCA provides that a corporation which fails to maintain an ISC Register (or to produce same upon request) is liable to a fine. In addition, every director, officer or shareholder who knowingly contravenes its obligations with respect to the ISC Register may be liable to a fine or up to six months' imprisonment, or both.

2.5 China (private register)

The *Measures for the Reporting of Foreign Investment Information* issued by the Ministry of Commerce ("**MOFCOM**") and the State Administration for Market Regulation (the "**AMR**") effective from January 2020 (the "**Measures**") prescribes disclosure requirements for the "ultimate actual controller" of a foreign-investment entity ("**FIE**") in the People's Republic of China. Details of the ultimate actual controller must be provided using the AMR's online enterprise registration system. The information will then be shared with the MOFCOM.

(a) Entities in scope

Domestic entities (i.e., entities established in China with no foreign ownership or investment) are outside the scope of the Measures. The main entities within the scope of the Measures include: (i) foreign-invested enterprises (including foreign-invested companies and partnership enterprises); and (ii) representative offices of foreign enterprises established in the PRC that are engaged in production and operational activities.

(b) Test for ownership

Broadly, the ultimate actual controller is a natural person, enterprise, governmental organisation or international organisation that, directly or indirectly, exercises ultimate control over the investor in the FIE, whether through shares, by contract, by way of trust or otherwise. If the actual controller is outside the PRC, the chain should be followed up to a listed company or natural person outside the PRC, a foreign governmental organisation (including government funds) or an international organisation. If the actual controller is inside the PRC, the chain should be followed up to a PRC-listed company, a natural person in the PRC or a state-owned/collective enterprise. Given the above, a partnership or a fund would not be deemed as a qualified actual ultimate controller of an FIE for the aforesaid reporting purpose. In such case, it is still required to trace further upward to, for instance, an individual or several individuals who control the partnership or fund.

The manner of actual control is determined by: (i) direct or indirect holding, alone or together with associated investors, of not less than 50% of the enterprise's shares, equity interests, shares of property, voting rights or similar rights or interests; (ii) direct or indirect holding, alone or together with associated investors, of less than 50% of the enterprise's shares, equity interests, shares of property, voting rights or similar rights or interests, but of sufficient voting rights to influence materially the decisions of the enterprise's organ of authority; or (iii) other circumstances enabling material influence on the enterprise's operational decisions, personnel affairs, financial affairs, or even technology.

(c) Key obligations

FIEs are required to comply with the Measures and provide accurate and truthful information. Generally speaking, the FIE must disclose the ultimate actual controller information when the FIE first registers with the AMR at the time of establishment or when it registers an amendment with the AMR which requires disclosure of the ultimate actual controller (e.g. during a transfer of equity interest, change of company name, etc.). The specific information to be disclosed to the enterprise registration system includes the name of ultimate actual controller, place of registration for a corporate entity or passport number or identity card number for a natural person.

If there is a change of ultimate controller of the FIE and it is not reported in the aforementioned circumstances, the FIE shall report the change through the enterprise registration system within 20 working days after the change occurred. In addition, the ultimate actual controller must also be disclosed during the FIE's AMR annual reporting (currently January to June each year). If an FIE fails to make supplemental or corrective filing within 20 working days after being notified by MOFCOM of missing or incorrect information filing, MOFCOM may order the FIE to take corrective action within an additional 20 working days. If the FIE still fails to do so, the FIE may be fined. Penalties may also be imposed if the information disclosed is erroneous. FIEs with a record of violations may also have their non-compliance records made public.

2.6 Brazil (private register)

Provisions similar to the EU Directive came into force in May 2016 through the *Normative Instruction No.1,634* (NI 1,634/2016), as amended by *Normative Instruction No. 1,863* (NI 1,863/2018) (the "**Normative Instruction**"). Pursuant to the Normative Instruction, upon enrolment with the National Corporate Taxpayers Registry (*Cadastro Nacional da Pessoa Jurídica* or "**CNPJ**") or upon request by the tax authorities, certain entities must disclose old and new registers of UBOs.

(a) Entities in scope

The obligation to maintain and disclose a register of UBOs generally applies to: (i) legal entities required to register with the CNPJ; (ii) clubs and investment funds, established in accordance with the rules of the Brazilian Securities Commission (*Comissão de Valores Mobiliários*); (iii) foreign entities that, in Brazil, are owners of rights over real estate, vehicles, crafts, aircraft, checking accounts, investments in the financial and/or capital market or interests in equities established outside the capital market; (iv) foreign entities that carry out the activities of leasing, vessel chartering, equipment rental or importation of goods to be contributed as capital contributions in Brazilian entities; (v) foreign financial institutions that carry out purchase and sale transactions of foreign currency with banks in

Brazil, receiving and delivering cash in kind in the liquidation of foreign exchange transactions; and (vi) Special Partnership Agreements (*Sociedade em Conta de Participação*) related to the ostensible shareholder. In some circumstances, exemptions may apply, including for foreign entities that are registered as public entities (whether listed or not) in Brazil.

(b) Test for ownership

The definition of UBO generally refers to individuals who: (i) directly or indirectly hold, control, or "significantly influence" an entity; or (ii) on whose behalf a transaction is undertaken. "Significantly influence" means the individual who: (a) directly or indirectly holds more than 25% of the entity; or (b) directly or indirectly holds or exercises the majority of the voting rights of the entity (including the power to appoint the majority of the administrators of the entity), even without controlling it.

The Normative Instruction provides exceptions to the definition above whereby some entities may be considered the UBO, instead of individuals. An exception is made, for example, for legal entities incorporated as public companies in Brazil or in countries that require public disclosure of all relevant shareholders, provided that such companies were not incorporated in low-tax jurisdictions or privileged tax regimes. Where an exception applies, the information submitted to the Brazilian IRS must indicate the individual with authority to represent such entity, as well as its controllers and administrators. Given the applicable exceptions, the determination of the UBO must be analysed on a case-by-case basis.

(c) Key obligations

Obligated entities are required to investigate and determine its UBOs, maintain its own register of beneficial owners in the CNPJ, and keep information up to date. The reporting process involves two steps with the electronic system of the Brazilian tax authorities: reporting the UBOs through an electronic form and providing supporting documentation. These include: a statement with the organisational chart of the obligated entity evidencing its UBO; the articles of organisation and bylaws of the obligated entity; a corporate document evidencing the powers of the legal representative of the obligated entity; power of attorney granted by the obligated entity to a Brazilian resident with powers to receive service of process and represent it before the Brazilian tax authorities; and a copy of the personal document or passport of the legal representative of the obligated entity. The information must be disclosed upon enrolment with the CNPJ, or upon request from the tax authorities but is otherwise not publicly available. The information is not publicly available as it is held by the Brazilian tax authorities.

The Normative Instruction also provides that entities domiciled abroad but enrolled with the CNPJ must notify their UBO on the electronic system of the Brazilian tax authorities (along with the DBE forms and documents listed above) within 90 days as from the date of their enrolment with the CNPJ to avoid the suspension of the CNPJ. In addition, any change involving the UBO or corporate details (e.g. corporate name, address, etc.) of the obligated entity shall be informed to the Brazilian tax authorities within 30 days as of such change. Entities failing to disclose their UBO will generally have their CNPJ registry suspended and will not be able to conduct transactions (new investments or loans) with local financial institutions.

2.7 United States of America (no register)

There are currently no legal requirements to disclose information on beneficial owners of US corporations or limited liability companies. However, on October 22, 2019, the US House of Representatives passed the *Corporate Transparency Act of 2019 (H.R. 2513)* ("**CTA**"). If passed in the Senate, the CTA would bring the US in line with international standards governing the disclosure of beneficial ownership and would require applicants seeking to form a corporation or limited liability company to file a report with the Financial Crimes Enforcement Network ("**FinCEN**") listing the beneficial owners of the entity and to update this report annually.

If enacted, the CTA would cover any corporation or limited liability company formed under any state law, as well as any non-US entity eligible to register to do business under any state law. Certain exceptions would apply for entities such as issuers of registered securities.

The CTA defines a beneficial owner as "a natural person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise exercises substantial control over a corporation or limited liability company, or owns 25% or more of the equity interests of a corporation or limited liability company, or receives substantial economic benefits from the assets of a corporation or limited liability company". The definition excludes certain natural persons, including employees of corporations or limited liability companies whose control of the entity is a result of their employment.

Applicants would be required to provide for themselves and for each beneficial owner of an applicable entity information such as: full legal name; date of birth; current residential or business address; and passport or government-issued identifying information. FinCEN may provide this information to state and federal law enforcement agencies only for the purposes of law enforcement, national security or intelligence.

If the CTA is enacted, applicable entities formed prior to its enactment would have two years to either report the required details about their beneficial owners or register for an exemption with FinCEN. Failure to comply could result in a civil penalty and/or imprisonment for up to three years. Non-compliance includes knowingly providing or attempting to provide false or incomplete information.

3 Looking Ahead

It is undeniable that there is a trend toward increased corporate ownership transparency around the world. However, despite the international push towards transparency, local frameworks for determining and reporting beneficial ownership remains inconsistent, with specific requirements varying from jurisdiction to jurisdiction. While we should expect increased global alignment in the future, the current lack of consistency poses unique challenges for multinationals managing the various compliance requirements in different jurisdictions, including the different information that needs to be provided and timelines imposed for reporting.

In addition, the underlying legislation in many jurisdictions remains new and subject to refinement through interpretative guidance and accompanying regulations that have yet to be published. For example, in Canada, the ISC register requirements under the CBCA currently exempt "reporting issuers" (i.e. public corporations) from the requirement to prepare and maintain the ISC, but this exemption does not extend to the wholly owned subsidiaries of public corporations and it is not yet clear how disclosure requirements under securities laws will intersect or overlap with the ISC register requirements. Regulations to clarify this and provide additional guidance to CBCA corporations are only in the consultation stages, despite the ISC Register requirement being introduced last year.

Given the varying requirements and interpretative guidance in different jurisdictions, multinational companies should consider taking the following steps in an effort to ensure they are compliant with legal requirements:

- Identify all subsidiaries within the corporate group structure that are subject to beneficial ownership disclosure requirements.
- For each relevant subsidiary, review and consider the ownership structure up the chain to the ultimate parent company, taking into consideration where control (e.g. management) and ownership (e.g. economic interest) lies at each step in the chain.
- Carefully work through the applicable disclosure requirements in each jurisdiction (with the assistance of local counsel where needed), to identify the individuals or entities that must be disclosed as beneficial owners or persons with significant control.
- Collect the necessary information/documents in line with local requirements for each owner or person, taking into consideration any necessary certifications or formalities for documents (e.g. translations, notarisation and legalisation).
- Prepare the relevant forms or registers for each subsidiary and file or keep same at the designated location in accordance with local legal requirements.
- Develop and initiate an internal process for how the necessary forms and registers should be updated on a regular basis for changes. This may involve a notification system for internal transactions (e.g. reorganisations or restructurings) and/or periodic check-ins for each jurisdiction.
- To the extent possible, ensure that information collected and disclosed for all subsidiaries is consistent across jurisdictions to avoid discrepancies and misinformation being provided to regulators. This may mean collecting and maintaining information on beneficial owners or persons with significant control centrally and referencing the same corporate structure chart for submissions (redacted as necessary) to meet all disclosure requirements.

As with all disclosure obligations, companies need to strike a balance between providing sufficient and accurate information while avoiding over-disclosure that can cause confusion. Going forward, whether a jurisdiction is enacting new legislation or providing interpretative guidance on existing legislation, more changes are to come. In the UK, for example, the government has proposed introducing a Registered Overseas Entity Register for overseas entities that either (a) own UK property, or (b) participate in UK public procurement tenders over certain thresholds. The target implementation date is 2021.

As disclosure and reporting requirements find their feet, we can expect enforcement mechanisms such as audits for accuracy and completeness of information, requests by public authorities for access to private registers as well as the imposition of fines and penalties for non-compliance all to be tested. With global developments being constant, it will be increasingly important for multinational companies to keep a close eye on such developments to ensure compliance.

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