

## THE LUXEMBOURG REGISTER OF BENEFICIAL OWNERS

### INTRODUCTION

On 15 January 2019, the Luxembourg law dated 13 January 2019 establishing a Luxembourg Register of beneficial owners (*registre des bénéficiaires effectifs*), in abbreviated form referred to as the **RBE**, was published (the **Law**).<sup>1</sup>

The Law will enter into force on 1 March 2019, and the entities to which the Law applies will have 6 months to comply with the provisions of the Law. Ultimate beneficial owners (*les bénéficiaires effectifs*), in abbreviated form referred to as the **UBOs**, of entities to which the Law applies, need to be identified in the RBE.

The Law implements article 30 of the 4<sup>th</sup> Anti-Money Laundering Directive<sup>2</sup> (the **4<sup>th</sup> AML Directive**), as amended by the 5<sup>th</sup> Anti-Money Laundering Directive (the **5<sup>th</sup> AML Directive**).<sup>3</sup>

### SCOPE OF THE LAW

The Law applies to all entities registered with the Luxembourg Trade and Companies Register (*Registre de Commerce et des Sociétés*), in abbreviated form referred to as **RCS**. In principle, all types of management companies and all types of investment funds fall within the scope of the Law.<sup>4</sup> However, to a certain extent, listed entities (registered with the RCS) are exempted.

### OBLIGATIONS UNDER THE LAW

#### UBO

The obligations contained in the Law relate to UBOs (as defined in the law dated 12 November 2004 on the fight against money laundering and terrorist financing, as amended (the **AML Law**)) of those entities which fall within the scope of the Law.

Following the AML Law, any natural person who ultimately owns or controls the entity through direct or indirect ownership or control over a sufficient percentage of the shares or voting rights

or ownership interest in that entity, including through bearer share holdings or through control via other means, other than a company listed on a regulated market that is subject to disclosure requirements consistent with European Union law or subject to equivalent international standards which ensure adequate transparency of ownership information, shall be considered a UBO.

A shareholding of 25% plus 1 share or an ownership interest of more than 25% in an entity held by a natural person, shall be an indication of direct ownership. Furthermore, a shareholding of 25% plus 1 share or an ownership interest of more than 25% in an entity 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.

#### Information to be filed

The RBE shall contain the following information (and relevant documentation): last name, first name(s), nationality(ies), date of birth, place of birth, country of residence, the exact private address or exact professional address of the UBO, and the identification number for the individuals registered in the Luxembourg Register of Natural Persons (or for non-resident individuals their national identification number). Furthermore, detailed information on the nature and the extent of the beneficial interest held by the UBO must also be filed with the RBE. Qualifying listed entities are only required to provide the name of the market on which their securities (*titres*) are traded.

The information (and relevant modifications) filed with the RBE will be kept by the RBE for a period of 5 years after the date on which the entity was removed from the RCS. If such removal is caused by the dissolution of the entity, the entity must designate

<sup>1</sup> Loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs..

<sup>2</sup> 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.

<sup>3</sup> Directive (EU) 2018/843 of the European Parliament and 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.

<sup>4</sup> Loi du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises.

a place where the data will be kept for a period of 5 years after the removal and file the designated place with the RCS.

The entity itself is also required to obtain and file at its registered office adequate, accurate and up-to-date information (and relevant documentation) regarding their UBO(s). This so called **internal file**, should in principle include the same information and documentation as the information and documentation filed with the RBE.

#### *Obligation to keep data accurate and up-to-date*

Any person having access to the RBE and any professional (as referred to in the AML Law) is obliged to inform the Luxembourg Business Registers (the **LBR**), the manager of the RBE, within thirty (30) days from the moment they become aware that the information filed with the RBE is incomplete, wrong or not up-to-date. After the LBR has been informed, the LBR will require the relevant entity to update the information contained in the RBE.

Such obligation in particular lies with professionals such as credit institutions, professionals of the financial sector, notaries, lawyers, undertakings for collective investment in transferable securities and alternative investment fund management companies.

#### **ACCESS TO THE RBE**

Luxembourg national authorities will have, for the purposes of their duties, access without restriction to the information contained in the RBE. Any other person may, without any condition of residence and without having to demonstrate any specific interest, also access the information contained in the RBE, except for the exact private address or exact professional address of the UBO and their identification number. The RBE can be accessed and consulted electronically. Upon request, the LBR will issue electronic or physical extracts.

The UBO and/or the related entity may not be informed about any consultation by Luxembourg national authorities.

#### *Limitation of access*

On a case-by-case basis and only in certain exceptional circumstances, the UBO and/or the related entity may request a restriction of the access of information contained in the RBE. This restriction, however, does not apply for the national authorities, credit and financial institutions, as well as bailiffs and notaries acting in their professional capacity, which can therefore always access the information contained in the RBE. If such restriction is granted (for the duration of the circumstances and for a maximum

period of 3 years), the information to that effect will be published in the RBE.

#### **TECHNICAL ASPECTS OF THE RBE**

The technical aspects relating to the RBE, such as for example the electronic filing with the RBE, the procedure for the access to the RBE and the fees to be paid to the LBR, will be addressed by way of Luxembourg Grand-Ducal regulations. These Grand-Ducal regulations are, however, not yet available.

#### **DEADLINES**

The required information (and relevant documentation) needs to be filed with the RBE, maintained by the LBR, within 1 month after the entity has become aware or should have become aware of an event which triggers the filing or updating of the RBE.

In principle, all communication with the LBR and the relevant entity and the filing of required information will be made electronically on the website of the LBR.

The LBR will register the information within 3 days following the filing. In case information is missing or inaccurate, the LBR will reject the request and ask the entity for additional information. The entity must revert to the LBR with the requested additional information within 15 days. If the LBR is still not satisfied, it notifies the entity of its refusal in a letter that is motivated and indicates the means of objection. Any interested party may pursue legal action against that refusal, to be filed before the president of the Luxembourg district court (*tribunal d'arrondissement*).

#### **GRACE PERIOD**

The Law will enter into force on 1 March 2019. The entities to which the Law applies will have 6 months as from the entry into force of the Law to comply with all the provisions of the Law. Any access and consulting may be requested after the expiration of the grace period of 6 months.

#### **SANCTIONS FOR NON-COMPLIANCE WITH THE LAW**

In principle, the non-compliance by an entity with the obligations (i) to file and give upon request the relevant accurate, complete and up-to-date information and modification thereof with the RBE, (ii) to set up and keep an internal file of its UBO(s), and (iii) to keep and give upon request accurate and up-to-date information to national authorities and professionals (as referred to in the AML Law), may result in a fine ranging from €1,250 to €1,250,000.

A UBO that does not comply with its obligation to cooperate and provide the entity with the required information, may result in a fine ranging from €1,250 to €1,250,000.

#### APPLICABLE LAW

In order to determine the nationality of a company and the applicable law, it is necessary to identify where the effective seat of the company is located. It is here where two different theories may apply:

- (i) The 'Real Seat Theory' (*théorie du siège effectif*). According to this theory, the applicable laws to a company are those of the jurisdiction in which the company has its 'real' seat (i.e. depending on the jurisdiction involved this generally comes down to the management and control centre of the company).
- (ii) The 'Incorporation Theory' (*théorie de l'incorporation*). According to this theory, the applicable laws to a company are those of the jurisdiction in which the legal entity has been incorporated (i.e. the place of incorporation as determined in the articles of association), irrespective of there the company has its real seat.

Luxembourg applies the Real Seat Theory as, on the other hand, the Netherlands apply the Incorporation Theory.

In practice, the parallel application of abovementioned theories often raises difficulties. By way of example, if a company was incorporated in the Netherlands and transfers its registered seat to Luxembourg, from a Dutch perspective the company will still be considered a Dutch company, whereas from a Luxembourg perspective it will be considered a Luxembourg company. Consequently, the company will have dual nationality and must comply with both Luxembourg and Dutch law. Visa versa, if a company was incorporated in Luxembourg and transfers its registered seat to the Netherlands, from a Dutch perspective the company will not be considered a Dutch company, whereas from a Luxembourg perspective, it will not be considered a Luxembourg company any longer.

#### DUTCH UBO REGISTER

The implementation of the Dutch UBO register has not yet been realised, since no (final) legislative proposal for the Dutch UBO register has been submitted to the Dutch Parliament.

However, it seems that the Dutch Government intends to implement legislative for the Dutch UBO register in accordance

with the Incorporation Theory as applicable in the Netherlands. In this respect, if a company is established in another country than the Netherlands (not applying the Real Seat Theory) but effectively managed in the Netherlands, the company will not fall under the scope of Dutch legislative regarding the Dutch UBO register.

#### HOW CAN WE HELP

The professionals at HVK Stevens have the legal, tax and financial knowledge and experience that suits every phase in your life, and that of your company – from start-up to sales, acquisition to succession, both in Luxembourg and the Netherlands.

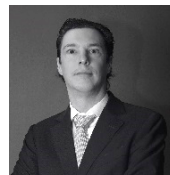
Our multi-disciplinary team can assist you in complying with the new obligations arising from the Law as per 1 March 2019.



**WILLEM GERBERS**

+31 (0)6 13 85 95 70

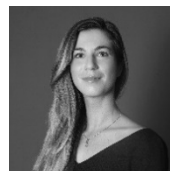
[w.gerbers@hvkstevens.com](mailto:w.gerbers@hvkstevens.com)



**JOOST VAN DEN BERG**

+31 (0)6 13 32 42 66

[j.vandenberg@hvkstevens.com](mailto:j.vandenberg@hvkstevens.com)



**TAMARA HIRSCH**

+31 (0)6 51 87 93 16

[t.hirsch@hvkstevens.com](mailto:t.hirsch@hvkstevens.com)