



# FATF Guidance

## Transparency and beneficial ownership

**Michael JJ Martin**  
Partner  
Governance, Risk  
& Compliance  
Deloitte Luxembourg

**Eric Collard**  
Partner  
Governance, Risk  
& Compliance  
Deloitte Luxembourg

**Irène Sanna**  
Analyst  
Governance, Risk  
& Compliance  
Deloitte Luxembourg

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# Countries whose national laws do not contain provisions on trusts or which do not recognise trust or similar legal arrangements are not exempt from obtaining information on beneficial ownership of trusts

## Introduction

On 27 October 2014, the Financial Action Task Force (FATF) adopted a Guidance on Transparency and Beneficial Ownership. FATF Guidances assist the interpretation of the FATF Recommendations, which set international standards against money laundering and terrorism financing (ML/TF). The Guidance aims at assisting policy makers and practitioners in national authorities in the implementation of FATF Recommendations 24 (Transparency and Beneficial Ownership of Legal Persons) and 25 (Transparency and Beneficial Ownership of Legal Arrangements). Corporate vehicles are used to conduct and facilitate business activities, but they can be misused to launder the profits of illicit activities. The misuse of corporate vehicles for illicit activities can be reduced and prevented if information on the underlying persons conducting the business is easily accessible by the competent authorities.

## The misuse of legal persons and arrangements and the definition of beneficial owner

Relevant studies have demonstrated the misuse of legal persons and arrangements for the purpose of concealing the identity of criminals, the purpose of assets held by corporate vehicles and the source or use of the funds through instruments such as shell companies, complex ownership and control structures, bearer shares etc. Moreover, when complex legal structures involve multiple jurisdictions, slow international co-operation may frustrate the recovery of

the information. Lack of legal obligations on companies and trusts to provide information on the beneficial owners contributes to a higher risk of using legal persons and arrangements for the purpose of ML/TF.

The definition of beneficial ownership provided by the FATF Recommendations in the context of legal persons refers both to the person who ultimately owns the legal entity, as well as to the person who can take relevant decisions within the legal entity. The notion mainly focuses on identifying the natural person who actually owns and takes advantage of the assets held by the legal person; it also includes natural persons on whose behalf transactions are conducted. In the context of legal arrangements, the FATF Recommendations identify the beneficial owner as the natural person who ultimately owns or controls the legal arrangement and who exercises control over the legal arrangement.

## Effective mechanisms to combat the misuse of legal persons and arrangements

In February 2013, the FATF has developed a system to assess to which extent financial systems and economies are protected from the risks of ML/TF, using eleven Immediate Outcomes. When a financial system complies with Recommendations 24 and 25, the country's AML/CFT system is effective, therefore *'legal persons and legal arrangements are prevented from misuse for money laundering or terrorist financing, and information on their beneficial ownership is available to competent authorities without impediments'* (Immediate Outcome 5).

### Enhancing transparency of legal persons – Recommendation 24

Recommendation 24 applies to all legal persons including companies, foundations, partnerships, associations and any type of entity that can own property and enter into a customer relationship with a financial institution.



#### 1. Initial obligations

In order to enhance transparency of legal persons, countries should adopt appropriate measures for each type of legal entity, based on a risk-based approach; moreover, countries should ensure that competent authorities have access to the information in a timely manner. Examples of appropriate measures to enhance transparency of the legal persons are: identification of the type of entity and of its basic characteristics; identification of the process of creation of the entity and identification and registration of the data on the beneficial owner of the legal entity; public availability of the identified information; assessment of the correspondent ML/TF risks related (including risks related to specific jurisdictions and to specific types of services provided).

#### 2. Enhancing transparency

After setting obligations, countries should implement measures to enhance transparency of legal entities. This process entails two main features: obtaining basic information on the legal entities and obtaining information on the beneficial owners of the entities.

- **Basic information**

Obtaining basic information on the legal entities comprises two steps.

Firstly, each country should have a company registry that contains publicly available basic information on the companies (e.g. name, proof of incorporation, legal form and status, registered address etc.). Secondly, legal entities should collect and record basic information on the entity itself (e.g. name, proof of incorporation, legal form and status, registered address etc.) and keep a duly updated register containing the list of shareholders as well as the number and category of shares held by each shareholder.

- **Beneficial ownership**

The process of gathering information on the beneficial ownership of legal entities is more complex. Beneficial ownership of a legal entity is identified through three main criteria. According to the first criterion the beneficial owner of the company is the natural person who may control the legal person through ownership interests, either through holding a certain percentage of the ownership interests (threshold approach) or through exercising de facto control over the entity, alone or together with other shareholders (majority interest approach).

The second criterion identifies beneficial ownership in the natural person(s) who controls the legal entity through other means. Other means include the natural person being personally connected to other natural persons who actually have control of the ownership of the legal entity; the natural person may also control the entity by financing it or by having family relationships with other persons in control.

The third criterion is a residual criterion used when no natural person is identified according to the other two criteria. The third criterion gives relevance to the natural persons exercising control of the entity through holding positions within the legal entity. The identified natural person is responsible for strategic decisions that fundamentally affect the business practices or exercises control over daily affairs through holding a senior management position.

The information on beneficial ownership should be recorded and available for consultation. Recommendation 24 establishes three mechanisms to ensure that the information is collected and available.

By adopting the first mechanism, countries require company registries to obtain this information and keep it up-to-date. An efficient company registry holding beneficial ownership information might contain: basic and beneficial ownership information

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## Increased transparency is definitely a common trend for the coming years

on the companies, annual updates of that information, declarations about the ownership structure, verification of the identity of beneficial owners, etc.

According to the second mechanism, companies should obtain and hold information on beneficial ownership. With regard to this aspect, shareholder lists contain information on legal ownership but not necessarily on beneficial ownership, therefore they might not be sufficient to comply with the obligation. The second mechanism requires companies to take reasonable measures to obtain the information on beneficial ownership.

Examples of reasonable measures to obtain the information are: restrictions upon shareholders who fail to provide beneficial ownership information, sanctions against shareholders who provide false beneficial ownership information etc.

The third mechanism relies on existing information contained in sources already existing: company registries, financial institutions and designated non-financial businesses or professions (including customer due diligence information), other companies and competent authorities.

Examples of other sources of information are: tax authorities, financial institutions subject to AML/CFT obligations, asset registries (land, property, shares) etc.

Regardless of the mechanism chosen, countries have an obligation of co-operation with authorities and they must appoint at least one person in the designated country to co-operate with authorities on behalf of the legal entity. Additionally, companies must maintain the information for at least five years.

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## Trusts are regulated in Luxembourg by the Law of 27 July 2003 which ratifies the Hague Convention of 1 July 1985 relating to the law applicable to trusts and their recognition

### Enhancing transparency of legal arrangements – Recommendation 25

Legal arrangements are defined as *'trusts or other similar legal arrangements'* including fiducie, treuhand and fideicomiso. Trusts are usually established easily so that registration requirements are infrequent. Countries should identify ML/TF risks connected with trusts and similar entities, including risks related to jurisdiction or specific services provided by the legal arrangement.

Countries where national laws allow and recognise trusts should require trustees to obtain information on the beneficial ownership of the trusts and to keep that information up to date. Beneficial ownership information in a trust includes information on: the identity of the settlor, trustee protector (if any), beneficiary or class of beneficiaries or any natural person exercising ultimate control of the trust, as well as any information on regulated agents or service providers to the trust (e.g. advisers, managers, accountants etc.).

Countries whose national laws do not contain provisions on trusts or which do not recognise trust or similar legal arrangements are not exempt from obtaining information on beneficial ownership of trusts.

A trust may be constituted under and regulated by the law of one country but it can be administered in a different country. Therefore all countries should adopt measures that bind trustees to disclose their status to financial institutions or designated non-financial businesses or professions. Additionally, professional trustees should record the information for at least five years following their involvement with the trust. All countries should also arrange additional measures to facilitate access to information on the beneficial ownership of trusts. Several measures could serve the above-mentioned function. A registry of trusts could gather information on beneficial ownership, which would be available in a timely manner to competent authorities and for international co-operation.

Competent authorities, especially tax authorities, could be another important source of information on beneficial ownership; automatic exchange of information between authorities should facilitate the passing on of this information to competent authorities in foreign countries. According to Recommendation 22, designated non-financial businesses and professions are also subject to record-keeping obligations when dealing with legal arrangements. Specifically, trust and companies service providers are subject to record-keeping obligations when acting as a trustee of an express trust (or equivalent function for similar legal arrangements) and when acting as a nominee shareholder for another person.

### Effects on Luxembourg

The first addressee of the implementation of the FATF Recommendations is the legislator. It is explicitly expected that the legislator should set up national provisions that will enable the country to comply with the Recommendations, both for legal persons and for legal arrangements.

The second class of addressees of the Recommendations consists of companies and legal entities in general. They have the obligation to comply with the provisions set out at the national level by the legislator.

Legal entities are expected to gather the information on beneficial ownership of the company and to keep it up to date in their records. Moreover, each legal entity must appoint one person in Luxembourg designated to co-operate with authorities upon request.

The third class of addressees of the Recommendations includes designated non-financial businesses and professions as well as trust or company service providers; their role is especially crucial in identifying and obtaining information on legal arrangements, particularly on trusts. Trusts are regulated in Luxembourg by the Law of 27 July 2003 which ratifies the Hague Convention of 1 July 1985 relating to the law applicable to trusts and their recognition.

The Grand Duchy of Luxembourg allows and recognises trusts and they are regulated according to the law chosen by the settlor. Regardless of the law chosen by the settlor, if the trust is administered in Luxembourg, beneficial ownership information should be available in Luxembourg as well. According to Recommendation 22 designated non-financial businesses and professions should be subject to record-keeping obligations. The latter provision needs to be considered in parallel with legal professional privilege and legal professional secrecy protected by the Law of 10 August 1991 on the Profession of Lawyer and by the Criminal Code.

Transparency is a common trend. Earlier in the year, Luxembourg passed the Law of 28 July 2014 on Immobilisation of Bearer Shares and Units. Formerly, holders of bearer shares were not required to be identified in the shareholders' register of companies. The OECD's Global Forum on Transparency and Exchange of information for tax purposes recommended that Luxembourg should take appropriate actions to ensure the availability of information relating to the holders of this type of shares in all circumstances. As a result of the Law, the depository must be a Luxembourg professional such as credit institutions, professionals in the financial sector, qualified lawyers and chartered accountants.



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