Austrian Ministry of Finance (BMF)

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To the
Federal Ministry of Finance
Tax and Customs Coordination
Federal Offices
Federal Office for Fees, Transfer Taxes and Games of Chance
Customs Offices
Audits of Large-Scale Enterprises
Financial Procurator
Federal Fiscal Court

Identification, verification and reporting of beneficial owners in accordance with the Beneficial Owners Register Act - BORA (BORA), BGBl. (Federal Law Gazette) I No. 136/2017 (BORA, Federal Ministry of Finance Decree)

This decree reflects the legal opinion of the Federal Minister of Finance in connection with the identification, verification and reporting of beneficial owners in accordance with the Beneficial Owners Register Act – BORA (Wirtschaftliche Eigentümer Registergesetz - BORA). No rights and obligations that go beyond the statutory provisions can be derived from this decree. Citations to this decree shall be omitted in administrative decissions.

1. Scope of application

1.1. In general

The Beneficial Owners Register Act (BORA), BGBl. I No. 136/2017, implements the Register for Companies and Other Legal Entities provided for in the 4th Anti-Money Laundering Directive and the Register for Trusts within a single central register. On this basis, the Beneficial Owners Register is established as of 15 January 2018 and shall be operated by the Federal Minister of Finance as the registry authority.

In supplement to this decree, the registry authority has provided general information on the homepage of the Federal Ministry of Finance and an extensive collection of examples to help identify beneficial owners.

1.2. Reportable legal entities

The following companies and other types of legal entities with registered offices in Austria, as well as trusts and arrangements similar to trusts, come within the scope of the BORA in accordance with Article 1 para. 2 BORA:

- ordinary partnerships (offene Gesellschaften);
- limited partnerships (*Kommanditgesellschaften*);
- stock companies (*Aktiengesellschaften*);
- limited liability companies (*Gesellschaften mit beschränkter Haftung*);

- commercial and industrial cooperative societies (*Erwerbs- und Wirtschaftsgenossenschaften*);
- mutual insurance associations (*Versicherungsvereine auf Gegenseitigkeit*);
- small insurance associations *(kleine Versicherungsvereine*);
- savings banks (*Sparkassen*);
- European Economic Interest Groupings (EEIGs);
- European companies (legal form: SE; *societas Europaea);*
- European cooperative societies (legal form: SCE; *societas cooperativa Europaea*);
- private foundations pursuant to Article 1 PSG (the Private Foundations Act, PSG*, Privatstiftungsgesetz*);
- other legal entities, required to be entered into the Commercial Register pursuant to Article 2 no. 13 FBG (Austrian Commercial Register Act, *Firmenbuchgesetz*);
- associations pursuant to Article 1 VerG (the Associations Act, *Vereinsgesetz*);
- foundations and funds pursuant to Article 1 BStFG 2015 (the Federal Act on Foundations and Funds, *Bundes-Stiftungs- und Fondsgesetz*);
- foundations and funds established on the basis of a provincial act, provided that the application of this Federal Act is allowed under provincial law;
- trusts pursuant to Article 1 para. 3 BORA, if they are administered from within Austria. "Administration from within Austria" shall, in particular, exist if the trustee's place of residence or registered office is in Austria;
- arrangements of a similar nature to trusts, if they are administered from within Austria. "Administration from within Austria" shall, in particular, exist if the holder of a position of authority (fiduciary) of a comparable standing to a trustee has his/her place of residence or registered office in Austria.

By definition, the following do not come under the BORA:
- branches of foreign companies, which are recorded in the Commercial Register, since they are a legally dependent part of a legal entity with its registered office in a foreign country
- condominium associations
- agricultural associations
- civil law partnerships
- sole proprietors, even if they are recorded in the Commercial Register

There is no need to determine whether legal entities taken from the Commercial Register or the Register of Associations or charitable foundations or funds have registered offices in Austria, since this is done electronically. However, for trusts and arrangements similar to trusts, the trustee or comparable person must check whether there is a registered office in Austria (see Article 2.9.).

Exceptions from the scope of Article 1 BORA do not constitute exceptions from the scope of occupation-specific due diligence requirements under other supervisory laws. Conversely, exceptions included in other supervisory laws, such as the exception for publicly quoted companies in Article 2 no. 3 FM-GwG (Financial Markets Anti-Money Laundering Act, *Finanzmarkt-Geldwäsche-Gesetz*) (see also Article 1.2.2.) do not apply to the BORA.

1.2.1. Trusts and arrangements similar to trusts

A trust for the purpose of Article 1 para. 3 BORA is a legal form created by a person (the settlor/trustor) by means of a legal transaction among living persons or by means of a testamentary disposition, under which assets are entrusted to the supervision of a trustee for

the benefit of a beneficiary or for a specific purpose, whereby the trust itself may have legal capacity. A trust within the meaning of the BORA has the following characteristics:

1. The assets of the trust are separately held special assets and do not form part of the personal assets of the trustee;
2. rights in relation to the assets of the trust are registered in the name of the trustee or another person as a representative of the trustee;
3. the trustee has the power and obligation, about which he/she shall be required to give account, to manage, use or dispose of the assets of the trust in accordance with the provisions governing the trust as well as the particular obligations conferred upon him/her under law.

The fact that specific rights and powers are reserved for the settlor/trustor or that the trustee himself/herself has rights as a beneficiary, shall not necessarily preclude the existence of a trust. The existence of a trust as defined above cannot be restricted by the individual rights and powers of the trustor or the trustee.

Under Article 3 para. 4 BORA, the rights and obligations set forth in this Federal Act apply to the trustee or any person comparable to a trustee.

In general, trusteeships (*Treuhandschaften*) do not come within the definition of "arrangements similar to trusts", since their structures and functions are typically not comparable to those of trusts. However, if, due to its contractual structure, a trusteeship requires the administration of assets for the benefit of a person (beneficiary) other than the settlor/trustor, it must be determined in the individual case whether an arrangement similar to a trust exists. The obligation to make this determination applies to the trustee, since the reporting requirement applies to the trustee.

1.2.2. Publicly quoted stock companies

Under Article 1 para. 2 BORA, publicly quoted stock companies also fall within the scope of the BORA. Article 2 no. 3 FM-GwG (Financial Markets Anti-Money Laundering Act, *Finanzmarkt-Geldwäsche-Gesetz*) provides definitions and determines the meanings of terms under the FM-GwG. This subsection of the FM-GwG states that the definition of "beneficial owner" in Article 2 no. 1 BORA does not apply to publicly quoted companies under the FM-GwG. However, this does not mean that there is an exception from the reporting requirement under the BORA, which expressly places stock companies within the scope of the BORA in Article 1 para. 2 no. 3. Therefore, the beneficial owners of publicly quoted companies must be identified under the provisions of Article 2 BORA and reported to the Register.

2. Definition of "beneficial owner"

Under the introductory sentence of Article 2 BORA, beneficial owners are the natural persons in whose ownership or under whose control a legal entity ultimately stands. With respect to companies (Article 2 no. 1 BORA), the beneficial owners are the natural persons that either directly or indirectly hold a sufficient percentage of the shares or voting rights (including those held in the form of bearer shareholdings), who hold a sufficient participation in the company (including in the form of cooperative shares or a capital share), or who exercise control over the company.

This means that the beneficial owners of a company can only be natural persons who

- directly or indirectly hold a sufficient percentage of the shares or a sufficient participation in the company (1st group of cases),
- directly or indirectly hold a sufficient percentage of the voting rights of the company (2nd group of cases), or
- exercise control over the company (3rd group of cases).

Whether the prerequisites for the three groups of cases have been met must be examined separately for each potential beneficial owner. Therefore, the successful identification of one or more beneficial owners under the first or second group of cases does not constitute a release from the obligation to identify any additional beneficial owners under the remaining group of cases.

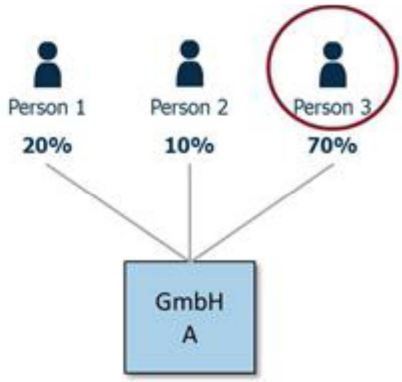
Therefore, all natural persons who meet the prerequisites of one or more of the three groups of cases must be identified as beneficial owners and reported. Only if no beneficial owner can be identified under any of the three groups of cases, may a secondary beneficial owner (= the top level of management of the reportable company) be identified and reported.

In making the identification, one must distinguish between direct and indirect ownership:
- **Direct beneficial ownership** exists where a natural person holds *a shareholding or voting rights of more than 25%* or *a participation of more than 25%* of the company *or one or more natural persons jointly exercise direct control over the company*.
- **Indirect ownership** exists where a legal entity holds a shareholding or voting rights of more than 25% or a participation of more than 25% of the company and one or more natural persons jointly exercise direct or indirect control over that legal entity.

2.1. Direct ownership

A direct beneficial owner under Article 2 no. 1 lit. a sublit. aa BORA is a natural person, who holds a shareholding, participation or voting rights of more than 25% of a company and one or more natural persons who jointly exercise direct control over the company.

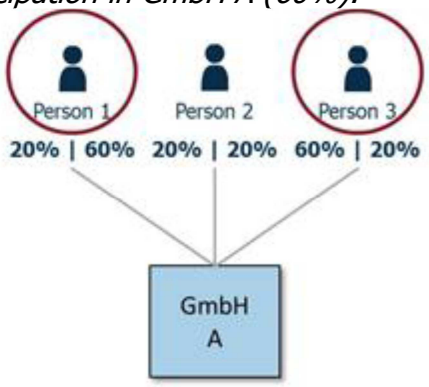
Example of direct ownership:
Person 3 is the direct beneficial owner of Limited Liability Company (GmbH) A, since Person 3 holds a participation of more than 25% of GmbH A. Persons 1 and 2 are not beneficial owners since they each hold less than 25% of GmbH A.



It should be kept in mind that each of the aforementioned groups of cases establishes direct beneficial ownership independently of the others. For example, direct ownership by a natural person can be established solely through direct control over the company, even if this person does not hold a sufficient percentage of the shares, participations or voting rights of the company, while another natural person may be a beneficial owner based on a direct

participation of more than 25% of the company. Likewise, a person with a 20% participation can be a beneficial owner if he or she holds more than 30% of the voting rights.

Example of direct ownership (participation and voting rights differ):
Although he/she only holds a 20% participation in GmbH A, Person 1 is a direct beneficial owner of GmbH A because he/she holds over 60% of the voting rights. Person 2 is not a direct beneficial owner of GmbH A, because, with 20%, he/she does not hold a sufficient participation or a sufficient percentage of the voting rights and does not otherwise exercise control. Person 3 is a direct beneficial owner of GmbH A because he/she has a sufficient participation in GmbH A (60%).

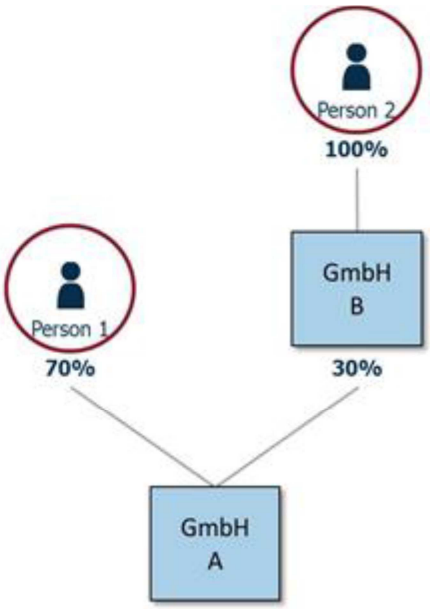


2.2. Indirect ownership

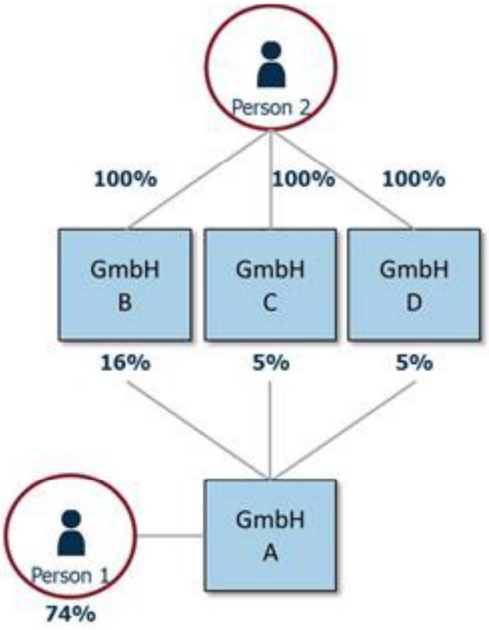
Indirect beneficial ownership under Article 2 no. 1 lit. a sublit. bb BORA exists where
- one or more natural persons jointly exercise direct or indirect control over a legal entity, which, in turn, holds a percentage of the shares, participations or voting rights of the reportable legal entity of more than 25% (Variant 1).
- If multiple legal entities, which are directly or indirectly controlled by the same natural person or persons, collectively hold a percentage of the shares, participations or voting rights of more than 25% of the company, this natural person is – or these natural persons are – beneficial owner(s) (Variant 2).

Natural persons and legal entities whose individual shares are below the threshold for direct or indirect ownership are to be included in this assessment. This applies, in particular, when there is additional evidence that suggests beneficial ownership. The examination must go as far as necessary to understand the ownership and control structure (Article 3 para. 1 BORA). This examination is of practical importance because beneficial ownership may only be identifiable through an aggregation of shares.

Example of indirect ownership (Variant 1):
The owners of GmbH A are a natural person and a legal entity. (Person 1 is the direct beneficial owner of GmbH A, since Person 1 holds more than a 25% share of GmbH A.) The direct owner of GmbH B, Person 2, is the indirect beneficial owner of GmbH A, since Person 2 exercises direct control over GmbH B, and GmbH B holds more than a 25% interest in GmbH A. Therefore, GmbH B is the ultimate legal entity.



Example of indirect ownership (Variant 2):
Person 2 holds an indirect interest in GmbH A through participations in GmbH B, GmbH C and GmbH D. Therefore, Person 2 is the indirect beneficial owner of GmbH A, since he/she directly controls several legal entities, which, in the aggregate, hold more than 25% of the shares of GmbH A. When aggregated, the shares of GmbH B, GmbH C and GmbH D equal a 26% share of GmbH A.

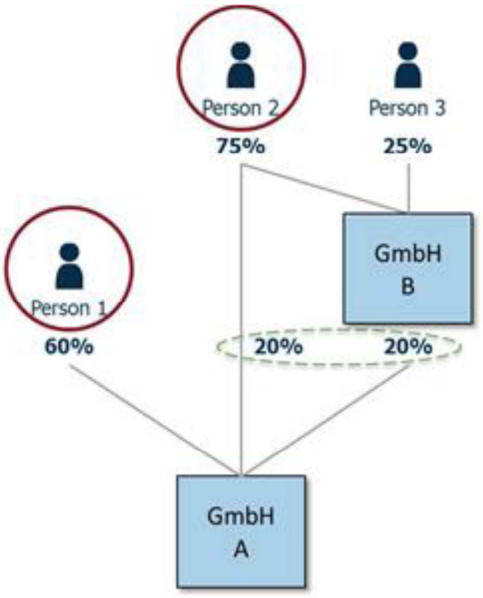


2.2.1. Adding the directly held shares of indirect beneficial owners

In calculating the shares and participations of natural persons, directly held shares must always be added to indirect shares in accordance with Article 2 no. 1 lit. a sublit. bb third sentence BORA. This addition must always be done at the same level of participation. The relevant person can be reported as a direct and indirect beneficial owner if the prerequisites for direct and indirect ownership are met.

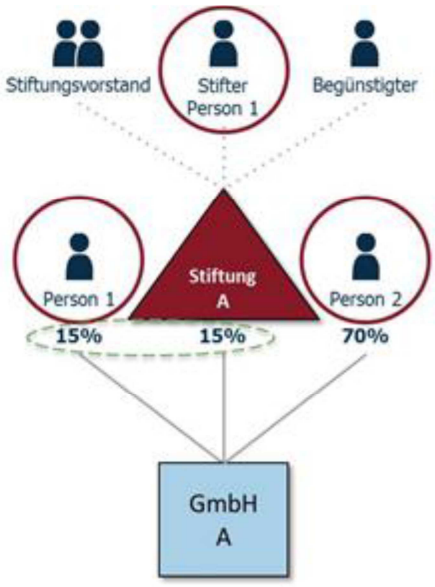
Example of the aggregation of direct and indirect shares:

For Person 2, the necessary 25% of GmbH A is produced by combining the direct 20% share of GmbH A with the indirect 20% share held via GmbH B. To aggregate direct and indirect shares, it is necessary that Person 2 be able to exercise control over GmbH B. This is the case, since Person 2 holds a 75% interest in GmbH B. Thus, beneficial ownership of GmbH B is based on the shares of GmbH A directly held by Person 2, even though the latter only holds 20% of GmbH A, and this alone could not establish beneficial ownership. Since Person 2's directly held share is less than 20%, Person 2 must only be reported as an indirect beneficial owner.



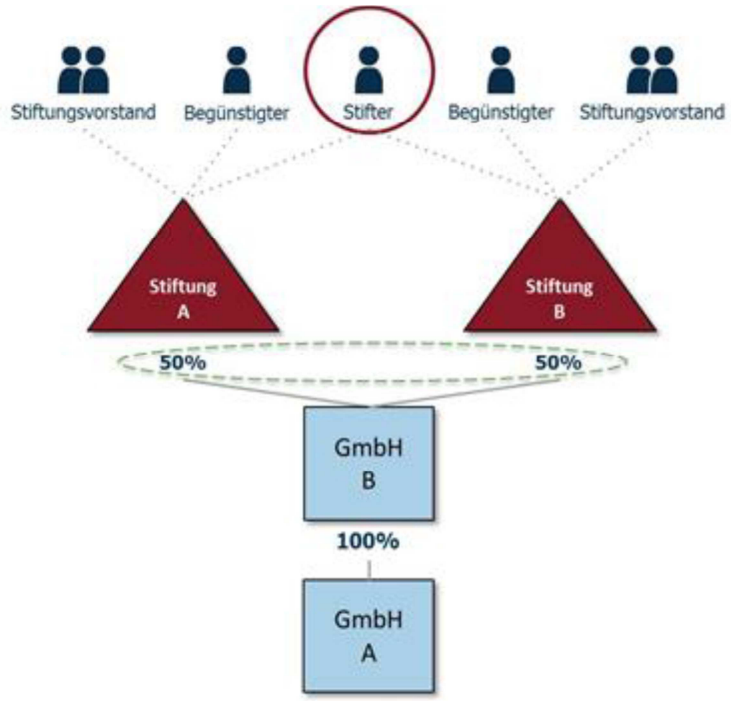
If a person performs a function for a private foundation that holds an interest in a reportable legal entity, the shares directly held by this person are to be added to the shares of the private foundation. However, this does not affect the beneficial ownership of the other persons who perform functions for the private foundation. Thus, in such cases, the private foundation is not reported as the ultimate legal entity. This would mean that all other functionaries of the private foundation would automatically be included as beneficial owners.

Example of the aggregation of direct and indirect shares of functionaries:
If a private foundation (Foundation A) holds a 15% interest in a reportable legal entity, GmbH A, and Person 1/the founder also holds a direct 15% interest, then only Person 1/the founder is a beneficial owner of GmbH A via the private foundation. Since the persons on the management board of the foundation and the beneficiaries are not beneficial owners because the private foundation's participation is too small, the private foundation is not reportable as the ultimate legal entity. Person 1 is to be reported as a direct beneficial owner, and the directly held share is to be added to the share held via the private foundation. The descriptor "by other means" is to be selected with respect to the nature and scope of the beneficial ownership.



The same procedure must be followed if some of the persons in two or more private foundations, which do not directly or indirectly hold a sufficient percentage of the reportable legal entity, are identical. The relevant persons (e.g. the founder, beneficiaries or foundation management board members) who perform functions at multiple private foundations can become beneficial owners through aggregation of their shares (nature and scope of the beneficial interest: "by other means"). The other functionaries are not beneficial owners. Therefore, the private foundation is not reportable as the ultimate legal entity.

Example of aggregation with respect to functionaries:
One person (the founder) is identical in Private Foundation A and Private Foundation B. Neither Private Foundation A nor Private Foundation B exercises control over GmbH B. However, since the founder performs functions for Private Foundation A and Private Foundation B, the participations of Private Foundation A and Private Foundation B in GmbH B are to be aggregated. This will only create a control relationship with respect to the founder. The founder is to be reported as a direct beneficial owner. With respect to the nature and scope of the beneficial ownership, "by other means" is to be selected. No ultimate legal entity is to be reported. The other functionaries of Private Foundation A and Private Foundation B are not beneficial owners of GmbH A.



2.3. Control

Under the definition in Article 2 no. 1 BORA, beneficial ownership of a legal entity can be based on the exercise of control over the company, apart from holding a sufficient percentage of the shares, a sufficient participation or a sufficient percentage of the voting rights. Control may be assumed if a natural person

- directly or indirectly holds 50% plus one share or a participation of more than 50% of the shares;
- meets one or more of the criteria in Article 244 para. 2 UGB (Company Code, *Unternehmensgesetzbuch*):
  - holds a majority of the shareholders' voting rights,
  - has the right to appoint or remove a majority of the members of the administrative, management or supervisory body and is simultaneously a shareholder, or
  - has the right to exercise a controlling influence,
  - has the right, based on a contract with one or more shareholders of a subsidiary, to decide how the shareholders' voting rights will be exercised, to the extent that their votes, together with the natural person's own voting rights, are necessary to achieve a majority of all the votes necessary to appoint or remove a majority of the members of the management or supervisory body; or
- performs a function pursuant to Article 2 no. 2 or no. 3 BORA for an ultimate legal entity; or
- ultimately controls the company by other means (see Article 2.3.8.); or
- based on an relevant trust agreement (Treuhandschaft) or comparable legal agreement can exert influence on the trust property (percentage of the shares, participation).

2.3.1. Pooled voting rights and syndicate agreements

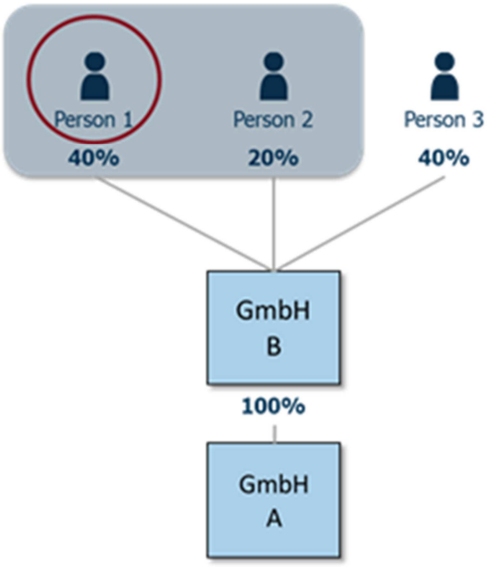
A syndicate agreement between the shareholders/partners of an existing or yet-to-be founded corporation or partnership is an additional contractual agreement, which supplements the law or the articles and bylaws. The pooling of voting rights as a component

of this agreement can enable the formation of a majority at the shareholders'/partners' meeting of the syndicate company.

A syndication agreement only establishes beneficial ownership if it goes beyond mere cooperation in the exercise of voting rights and a conciliation procedure or decision by a third party in the event of disunity. This means that, in identifying beneficial ownership, a syndication agreement establishes beneficial ownership only if it guarantees the right to a majority of the voting rights or the right to appoint/remove a majority of the members of governing bodies (see also *Nowotny* in *Straube/Ratka/Rauter*, UGB II/RLG[3] Article 244; 1 November 2011, rdb.at).

Therefore, pooled voting rights or a syndicate agreement establish(es) beneficial ownership by a person if this person can exercise the voting rights of other shareholders based on the contractual agreement. Thus, the deciding factor is that a shareholder or a shareholder group is able to achieve a majority, which the latter could not otherwise achieve with his/its shares in direct voting at the shareholders' meeting. Therefore, this shareholder must be entitled to a majority of the voting rights within the syndicate.

Example of a syndicate agreement:
Person 1, who holds a 40% interest in GmbH B, and Person 2, who holds a 20% interest in GmbH B, have concluded a syndicate agreement, which provides for a majority decision in the syndicate. Therefore, Person 1 has achieved a secure majority and has thereby attained control within the meaning of Article 244 para. 2 UGB solely through the syndicate agreement. In the consortium, Person 1 holds 40/60ths of the voting rights, through which he/she can influence 60% of the voting rights at the shareholders' meeting. Persons 2 and 3 are not beneficial owners of GmbH A because they lack control over it.



2.3.2. Joint control (groups of persons)

It should be kept in mind that, where Article 244 para. 2 UGB applies, each number (*Ziffer*) can generally only be fulfilled by a parent company, but it is possible for different parent companies to fulfil different numbers.

For example, with respect to an ultimate legal entity under the BORA, this means that

- Person A can be entitled to a majority of the voting rights and

- Person B, who only holds 20% of the shares, can have the right to appoint or remove a majority of the members of the administrative, management or supervisory body.

In this example, Person A and Person B each exercise control. Therefore, there can be no joint control within the scope of Article 244 para. 2 UGB.

However, the scope of Article 2 BORA also envisions the concept of joint control by multiple persons. Joint control can be based on an appropriate provision in the articles and bylaws, pooled voting rights or a syndicate agreement. The decisive factor is that such persons present themselves as a group to the outside world and reach unanimous decisions within the consortium. In this case, all the shareholders who are parties to the relevant contract are also beneficial owners. If decisions are reached by a majority vote in the syndicate, only those syndicate members who hold the majority of the voting rights in the syndicate can exercise control – and therefore are beneficial owners.

If only two shareholders have concluded a syndicate agreement, joint control exists even if their agreement is closed to the outside world and there is an internal decision-making mechanism.

Joint control can exist with respect to both direct and indirect beneficial ownership.

2.3.3. Establishing control through trusteeship agreements (Treuhandschaften)

Article 2 no. 1 lit. a last part BORA states that a settlor/trustor or comparable person can exercise control through a trusteeship (*Treuhandschaft*) relationship or comparable legal relationship. There can be control through a trusteeship agreement with respect to direct and indirect owners and within a chain of participations. Likewise, a trusteeship agreement can establish a control relationship between two legal entities.

Thus, direct beneficial ownership exists if a natural person or a legal entity (trustee) directly holds a sufficient percentage or a sufficient participation (trust property) in a legal entity based on a trust agreement (or comparable legal agreement) for a third party (settlor/trustor). Since the trust property is directly attributable to the third party under the agreement, the latter (settlor/trustor) is also a direct beneficial owner. In addition, the trustee, who is the civil law owner, is also a direct beneficial owner because he/she holds a sufficient share or participation.

The settlor/trustor always has control over the shares of the business or capital shares held in trust. Conceptually, the settlor/trustor must be substituted for the trustee, and it must be determined whether the settlor/trustor or a natural person on a higher level than him/her (e.g. under another trusteeship agreement) has beneficial ownership, upon aggregation with other directly and indirectly held or controlled shares. If the settlor/trustor does not have a sufficient participation after aggregation of all shares (e.g. if a share of 25% or less is held in trust and there are no additional participations), then the settlor/trustor is not a beneficial owner.

If the settlor/trustor is a legal entity, it must be determined whether natural persons, who are on a higher level than the legal entity, are beneficial owners based on the control relationship. If, for example, a private foundation, a charitable foundation or a fund, a trust or an arrangement similar to a trust is the settlor/trustor, then its functionaries are beneficial owners to the extent that the share held in trust establishes beneficial ownership. If, for

example, a limited liability company (GmbH) is the settlor/trustor, then the trusteeship agreement establishes the chain of control. In this case, natural persons who exercise control over the GmbH are beneficial owners of the reportable legal entity.

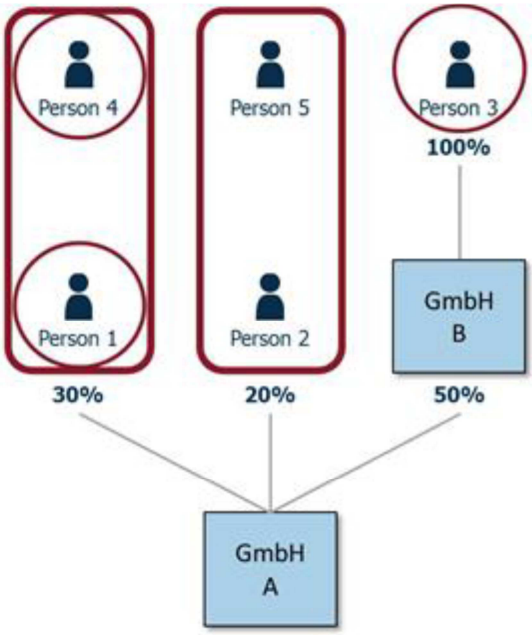
Under Article 5 para. 1 no. 3 lit. a BORA, the reportable legal entity must report the nature and scope of the beneficial interest of all beneficial owners, including whether a trusteeship relationship exists and whether the beneficial owner is a trustee or settlor/trustor.

However, trusteeships, which merely establish control between legal entities within the chain of owners, do not have to be included in the report. Moreover, the control relationships created by them must be included in determining the beneficial owners.

The reportable legal entity must verifiably inquire of its legal and beneficial owners or the relevant higher-level legal entities whether trusteeship agreements exist, which are relevant to determining beneficial ownership. If a trusteeship exists, the relevant documents must be inspected.

In any case, a trusteeship must be reported if it results in beneficial ownership by the settlor/trustor.

Example of trusteeship:
The legal owners of GmbH A are two natural persons (Persons 1 and 2) and a legal entity (GmbH B). Person 1 holds the shares in trust for Person 4; Person 2 holds the shares in trust for Person 5. Since the shares held in trust by Person 1 confer beneficial ownership on Person 4, Persons 1 and 4 are to be reported to the Register as direct beneficial owners. Persons 2 and 5 and the trusteeship between the persons do not have to be reported to the Register, since the shares held in trust by Person 2 do not establish beneficial ownership. Moreover, in this example, Person 3 must be reported to the Register as an indirect beneficial owner.



2.3.4. Representative of the party acting as the trustee in a professional capacity

In general, it should be noted that trusteeships (Treuhandschaften) should be included in reports to the Register if the trustees or settlors/trustors are beneficial owners (based on sufficient shares, voting rights or control). This applies irrespective of whether this has already been otherwise reported (e.g. to credit institutions or to the tax office).

If, for example, a representative of the party acting in a professional capacity holds shares in trust for a client as the sole shareholder of a company, the representative of the party acting in a professional capacity is a beneficial owner based on his/her legal ownership. The report should note that the shares are being held in trust and that the representative of the party is the trustee. If the settlor/trustor is a natural person, he/she must be reported to the Beneficial Owners Register as a beneficial owner with the information that a trusteeship exists. If the settlor/trustor is a legal entity, a control relationship is established, and it must be determined whether a natural person exercises control over this legal entity. This natural person must also be reported as a beneficial owner.

2.3.5. If an owner of a legal entity functions as a member of a governing body

If a shareholder of a limited liability company or a stock company does not have the necessary participation in the legal entity and at the same time functions as a member of a governing body of the relevant legal entity (managing director, management board member or supervisory board member), this fact, standing alone, does not make this person a beneficial owner. Functioning as a member of a governing body of a legal entity under Article 2 no. 1 BORA does not establish control within the meaning of the BORA.

2.3.6. Corporation under public law

If a corporation under public law is the direct owner of a reportable legal entity with at least a 75% interest or the indirect owner with more than a 50% interest, and there is no other form of beneficial ownership by a natural person, no beneficial owner can be identified for this legal entity, since a corporation under public law has no legal owner by definition. Therefore, this legal form does not come within the term "legal entity" under Article 1 para. 2 BORA and thus cannot be an ultimate legal entity. In particular, none of the functionaries of a corporation under public law meets the statutory definition of "control" and therefore cannot be beneficial owners.

Under Art. 19 para. 1 B-VG (Austrian Federal Constitutional Law), a Federal Minister is the ultimate executive authority. The Federal Minister, who is the administrator, is not considered to be a beneficial owner, even if the office of the Federal Minister has sole power to exercise the rights associated with the corporation's shares by operation of law. Therefore, in his/her role as executive authority, the Federal Minister, does not exercise control for himself/herself as a natural person but exercises it on behalf of the Federal Government.

The highest political level of another country, regardless of its political system, must be equated with the Federal Government or other political subdivision and therefore is not a beneficial owner and does not have a beneficial owner. If the chain of participations ends in a sovereign wealth fund, no beneficial owner can be identified from this participation.

If no other natural person can be identified as a direct or indirect beneficial owner, the top level of management of the reportable legal entity must be identified as the beneficial owner and reported to the Register under Article 2 no. 1 lit. b BORA.

If a corporation under public law is a founder or beneficiary of a private foundation, neither the corporation under public law nor its functionaries are to be reported to the Register.

2.3.7. Churches and religious groups

Churches and recognised religious groups also do not come within the definition of a legal entity under Article 1 para. 2 BORA. The same rules apply to them as to corporations under public law (see Article 2.3.6.).

2.3.8. Exercise of control by "other means"

Under the definition of "control" in Article 244 para. 2 UGB, control must always be legally established. This can only be assumed if there is an appropriate legal relationship (trusteeship agreement (Treuhandschaft)), provision in the articles and bylaws or vote pooling agreement). It should be kept in mind that not all contracts must be in writing.

When the amendment to the BORA takes effect on 1 August 2018, it will expressly clarify that natural persons who ultimately control the company "by other means" (de facto control) are also beneficial owners. The following statements also apply *mutatis mutandis* to Article 2 nos. 2 and 3 BORA. On the reporting form, "control" should be selected with respect to the nature and scope of the beneficial interest of these persons.

De facto control can be exercised in various ways. The crucial factor is always that key business decisions are made by the controlling party. Personal relationships with those at the top level of management or with partners or shareholders can establish de facto control, if they are designed so that these persons can exercise direct influence over key business decisions. All decisions relating to profit distributions are always key business decisions.

Example: The father/mother transfers the shares of a family-owned company to the children, who are also managing directors. The father/mother still exercises influence over key business decisions, which must be implemented by the managing directors, because, otherwise, there may be adverse effects for the father/mother in probate proceedings.

Example: The shares of a limited liability company (GmbH) are the sole property of one of the spouses. The other spouse is the managing director and has signed an assignment agreement with the shareholder, which permits purchase of the company's shares at a price that is significantly below market. The spouse who is the managing director has de facto control over the GmbH, since this spouse can also exercise shareholder's rights. Therefore, the managing director and the shareholder are both beneficial owners.

The top level of management of the reportable legal entity will generally know whether it is under the control of another person when making key decisions. This must be appropriately documented. It should only be assumed that shareholders or higher level legal entities have control in this sense if there is clear and objective evidence that supports the existence of de facto control. The evidence must be documented. Mere rumours or assumptions are not sufficient.

De facto control can result in an additional beneficial owner if a natural person exercises control in this sense. If a legal entity exercises control, it must be determined whether this

legal entity is, in turn, subject to the control of a natural person, who is then a beneficial owner.

In particular, with spouses, it cannot be automatically assumed that one of the spouses exercises control.

However, an economic approach, within the meaning of the Austrian Federal Tax Code (BAO, *Bundesabgabenordnung*) is not applicable in identifying beneficial owners.

2.4. Voting rights

According to the introductory sentence of Article 2 no. 1 lit. a BORA, having a sufficient percentage of shares is the equivalent of having a sufficient percentage of voting rights. Therefore, in judging whether direct and indirect beneficial ownership exits, one must not only consider the percentage of shares, participations or control rights, but also the percentage of voting rights.

If some of the shares are held by the stock company itself and the voting rights for such treasury shares are suspended for this reason, the weighting of the remaining percentage of voting rights shall be increased accordingly. Thus, natural persons who originally did not have a sufficient percentage of voting rights may become beneficial owners because the suspended percentage of stock company voting rights gives their voting rights greater weight. Likewise, the revival of non-voting preferred shares leads to a shift in the voting rights relationship and must be appropriately taken into account in identifying beneficial owners.

2.4.1. Inequality in the percentages of voting rights and shares held

If the percentage of shares does not equal the percentage of voting rights, the higher value must be used to identify beneficial owners. For example, if a natural person holds only 20% of the shares of a reportable legal entity, but holds 40% of the voting rights, this person is a direct beneficial owner of the reportable legal entity based on the 40% of the voting rights.

Since the focus is on both ownership and voting rights, it is not necessary for the reported percentages of shares and voting rights to add up to 100%.

2.4.2. Bearer shares

Under Article 9 para. 1 Aktiengesetz 1965 (AktG, Austrian Stock Corporation Act), shares must be registered shares except in the cases set forth in Article 10 para. 1. Under Article 10 para. 1, shares can be bearer shares if the company is publicly quoted or if the shares are to be admitted to trading on a stock exchange within the meaning of Article 3 Aktiengesetz 1965 under the company's articles and bylaws. In these cases, under Article 10a paras. 1 to 4 Aktiengesetz 1965, the ownership of bearer shares must be proven by a confirmation (safe custody receipt) from a custodian bank with its registered office in a member state of the European Economic Area or a full member state of the OECD. The articles and bylaws or the notice of convening can specify additional suitable persons or bodies whose safe custody receipts can be accepted by the company.

If a safe custody receipt is being used to prove that a person is currently a shareholder, it must be no more than seven days old when presented to the company. Therefore, when identifying beneficial owners of bearer shares, it is necessary to obtain the relevant safe

custody receipts and ensure that they meet the formal requirements set forth in Article 10a paras. 1 to 4 AktG. In such cases, the safe custody receipts can be used to identify and verify beneficial owners.

If the ultimate legal entity of a reportable legal entity is a stock company with its registered office in a foreign country, the latter is required under Article 4 BORA to provide the reportable legal entity with all the documents and information necessary to meet the due diligence requirements (Article 3 BORA). Under Article 3 BORA, the reportable legal entity itself is required to obtain copies of the documents and information necessary to meet its due diligence requirements, such as safe custody receipts as proof of holders of bearer shares.

2.5. Ultimate legal entity

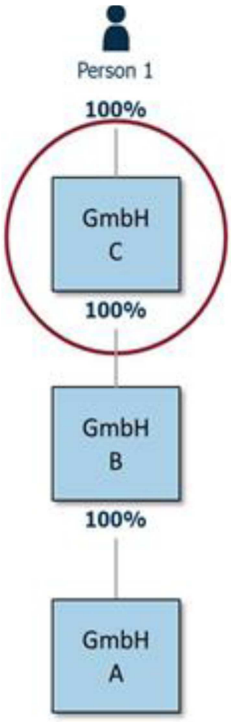
The term "ultimate legal entity" is only relevant in connection with indirect beneficial ownership. Under Article 2 no. 1 lit. a sublit. bb BORA, ultimate legal entities are

- those legal entities in a chain of participations that are directly controlled by indirect beneficial owners and
- those legal entities in which indirect beneficial owners directly hold shares or a participation, if these, considered with the legal entity/entities mentioned above, constitute beneficial ownership.
- If the beneficial owner performs a function in accordance with Article 2 no. 2 or no. 3 BORA, then the respective legal entity shall always be considered the ultimate legal entity.

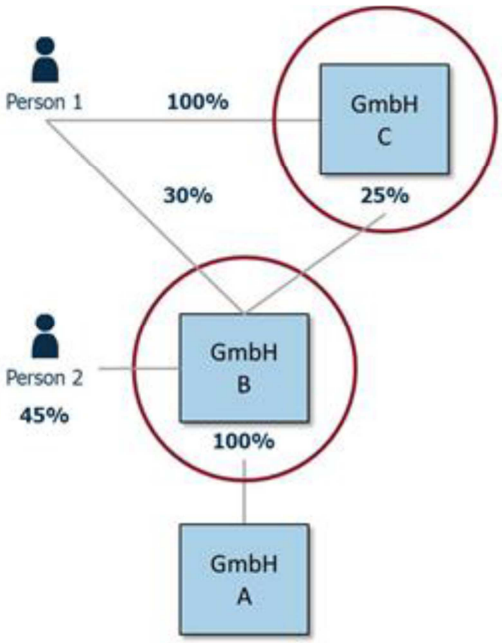
This definition of legal entity also includes comparable legal entities within the meaning of Article 1 BORA with a registered office in another member state or a third country.

An association or an ownerless company for which the top level of management was reported as secondary beneficial owners under Article 2 no. 1 lit. b BORA cannot be an ultimate legal entity. An association or other ownerless company can only be the ultimate legal entity if it is under the control of one or more natural persons.

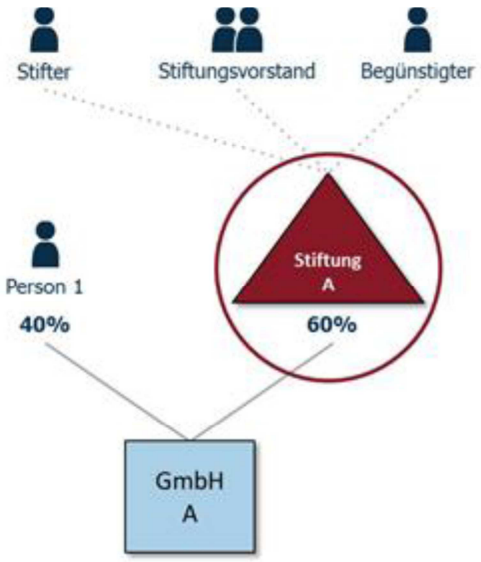
Example of an ultimate legal entity (Variant 1):
The ultimate legal entity of GmbH A is GmbH C, since the latter is directly controlled by Person 1 and therefore indirectly establishes the beneficial ownership of GmbH A by Person 1.



Example of an ultimate legal entity (Variant 2):
The direct participation in GmbH B held by the beneficial owner, Person 1, is necessary to establish the beneficial ownership of Person 1. Therefore, the ultimate legal entities are GmbH B and GmbH C.



Example of an ultimate legal entity (Variant 3):
The indirect beneficial owners of GmbH A are the persons who perform the relevant functions at Foundation A (founder, member of the management board of the foundation and beneficiary). Therefore, Foundation A is the ultimate legal entity. Person 1 is a direct beneficial owner. If the registered office of Foundation A is in Austria, then GmbH A must only report the foundation as the ultimate legal entity. In this case, the founder, the member of the management board of the foundation and the beneficiaries need not be reported.



2.6. Further aspects of determining beneficial ownership

2.6.1. Determining the ownership structures of partnerships

In partnerships, the partners' capital shares are not recorded in the Commercial Register. In particular, the limited partners' amounts of liability, which are recorded in the Commercial Register, are not suited for determining the individual partner's participations. Instead, the partners' capital shares are to be determined by inspecting the partnership agreement, since the provisions of the partnership agreement are controlling in determining beneficial ownership. In the absence of a contrary agreement by the partners, under Article 109 para. 1 UGB, their participations in the company are determined based on the ratio of the values of their agreed-upon capital contributions. In doubtful cases, the partners are deemed to hold equal shares.

If a partner's capital contribution is limited to providing services (working partner), this partner does not hold a capital share and therefore is not a beneficial owner.

In limited partnerships, both the personally liable partners (general partners) and the partners with limited liability (limited partners) can be beneficial owners if any such partner holds more than a 25% share of the capital. If no beneficial owners of a limited partnership can be identified, the general partners alone are secondary beneficial owners, since only they are authorised to represent the partnership.

In a limited partnership with a limited liability company as the general partner (GmbH & Co KG), both the limited partnership (KG) and the limited liability company (GmbH) are reportable legal entities, since both companies are legal entities with their own Commercial Register numbers. In determining the beneficial owners of the KG, the GmbH is always relevant if the latter holds a capital share of more than 25% in the KG. In this case, it must be determined whether a natural person directly or indirectly exercises control over the GmbH. If the GmbH is solely a working partner and is authorised to represent the KG, then the GmbH is only relevant in determining the secondary beneficial owner. In this case, the managing partners of the GmbH are also members of the top level of management of the KG and therefore its secondary beneficial owners.

2.6.2. Call options

The existence of a call option does not establish beneficial ownership within the meaning of Article 2 BORA, since the option only entitles its holder to buy or sell a specific percentage of shares at a pre-established price within a specific period of time or on a specific date. The holder of the option does not meet the prerequisites for beneficial ownership under Article 2 BORA and cannot be an owner until he/she exercises the option, unless the holder has additional rights based on additional contractual agreements.

It must be specifically determined in the individual case whether the holder can exercise control under a contractual agreement or a provision of the articles and bylaws, whether the legal relationship is a "comparable legal relationship" under Article 2 no. 1 lit. a final part BORA or whether the holder of the call option exercises de facto control.

2.6.3. Assignment agreements

Likewise, the existence of an assignment agreement, which, e.g., entitles a contracting party to acquire shares of the business in the future, does not establish beneficial ownership if the party acquiring the shares of the business can decide whether and when to acquire these shares, unless the latter has additional rights based on other contractual agreements.

It must be specifically determined in the individual case whether the contracting party can exercise control under a contractual agreement or a provision of the articles and bylaws, whether the legal relationship is a "comparable legal relationship" under Article 2 no. 1 lit. a final part BORA or whether the party to the assignment agreement exercises de facto control.

2.6.4. Right of first refusal

Similarly, the existence of a right of first refusal does not establish beneficial ownership by a third party (beneficiary of the right of first refusal), since the seller remains the beneficial owner until the sale. The person who was granted the right of first refusal is not a beneficial owner, unless the latter has additional rights based on other contractual agreements.

It must be specifically determined in the individual case whether the person with the right of first refusal can exercise control under a contractual agreement or a provision of the articles and bylaws, whether the legal relationship is a "comparable legal relationship" under Article 2 no. 1 lit. a final part BORA or whether the person with the right of first refusal exercises de facto control.

2.6.5. Silent partnerships and atypical silent partnerships

Under Article 179 para. 1 UGB, a silent partnership only exists if a capital contribution, which is made, passes into the assets of the owner of a company. The silent partner does not participate in the assets or the management of the company, but only in the company's profits and losses. Therefore, a silent partner is not a beneficial owner of a legal entity.

In an atypical silent partnership, the partner is also granted extensive rights to assets and control rights – contrary to the legal requirements. Therefore, the atypical silent partner not only participates in the profits and losses but also in the company's assets. In such cases, an atypical silent participation can establish beneficial ownership of a legal entity. However, the determining factor is the contractual formulation of the atypical silent participation and the asset and control rights allocated to the atypical silent partner.

2.6.6. Beneficial owners of insolvent companies

Legal entities that are in liquidation, reorganisation or insolvency proceedings also come within the scope of the BORA, and they are also subject to a reporting requirement under Article 5 BORA.

In cases where the legal owners are also the beneficial owners, the liquidation or the reorganisation or insolvency proceedings results in no change, as long as the conditions that led to the identification of the beneficial owners remain unchanged. If, after exhausting all possible means, no beneficial owners within the meaning of Article 2 no. 1 lit. a BORA can be identified and therefore the top level of management of the reportable legal entity is reported as the beneficial owners, it must be determined who the top level of management of the reportable legal entity is. In this case, the governing bodies of the legal entity are deemed to be the top level of management. In particular, the liquidator or insolvency administrator should only be reported as the top level of management if the legal entity no longer has a top level of management.

2.6.7. Guardians for adults and beneficial owners who are minors (statutory representatives and guardians)

There are no differences in identifying beneficial ownership with respect to beneficial owners who are minors or adults requiring guardianship. In these cases, ownership is attributed to the minor or adult requiring guardianship. The parents of the minors or the guardians of adults are not the beneficial owners and should not be reported to the Register.

2.7. Private foundations

The beneficial owners of private foundations are the persons designated in the definition in Article 2 no. 3 lit. a BORA based on the performance of their functions. The rights to which these persons are entitled is of no importance for purposes of the BORA.

With respect to private foundations under Article 1 para. 2 no. 12 BORA, this includes the following persons or groups of persons:

- the founders;
- the beneficiaries;
- the group of persons from whom the beneficiaries are selected on the basis of a separate determination (Article 5 PSG) (class of beneficiaries); if persons in this group receive benefits from the private foundation, the value of which exceeds EUR 2,000 within a calendar year, they shall be considered to be beneficiaries in the relevant calendar year;

– with respect to private foundations under Article 66 VAG 2016 (*Versicherungsaufsichtsgesetz 2016*, Insurance Supervision Act of 2016), savings bank foundations under Article 27a SpG (*Sparkassengesetz*, Savings Banks Act), foundations established for the purpose of supporting the entity under Article 4d para. 1 EStG 1988 (*Einkommensteuergesetz 1988*, Income Tax Act of 1988), foundations established for the purpose of supporting employees under Article 4d para. 2 EStG 1988 and foundations for the purposes of profit-sharing by workers and employees under Article 4d para. 3 and 4 EStG 1988, only the class of beneficiaries shall be reported in all cases;

- the members of the management board of the foundation;
- and every other natural person who ultimately controls the private foundation by other means.

The aforementioned persons or groups of persons shall be identified from the information in the Commercial Register, the foundation deed and the supplementary foundation deed, if any. For persons with no place of residence in Austria, an official photo identification document must be obtained, and their identity must be verified with the assistance of this passport copy.

It must be emphasised that the founders and the members of the management board of the foundation are always deemed to be beneficial owners based on the performance of their functions and must be reported, even if some other person ultimately controls the foundation. This also applies to the class of beneficiaries, if known, who must also be reported in these cases.

Neither the members of the supervisory board nor those of any advisory council established under Article 14 para. 2 PSG may be identified as beneficial owners, since neither the supervisory board nor the advisory council can perform the function of protector. It is true that the supervisory board is entitled to supervise the management and the conduct of the private foundation under Article 25 PSG. Due to the incompatibility provisions in Article 23 para. 2 PSG and the resulting broad exclusion of confidants and relatives of beneficiaries from the supervisory board, the intermediary role prescribed for the protector under the trust regime can generally not be fulfilled. This also applies to the advisory council, to which the same incompatibility provisions apply by analogy, as soon as the council is provided with appropriate responsibilities (an advisory council that is similar to a supervisory board) (*Kalss/Nicolussi, Die wirtschaftlich Berechtigten einer Privatstiftung und eines Trusts: Ein Vergleich der Rechtsformen, GesRZ 2015, 221 (228 et seq.))*. However, if the supervisory board or the advisory council is entitled to exercise a determinative control function due to the structuring of its rights in an individual case, then the members must be reported under Article 2 no. 3 lit. a sublit. dd BORA. Moreover, the foundation's auditor is not subsumed under Article 2 no. 3 lit. a sublit. dd BORA, since the auditor typically is not in a position comparable to a protector.

2.7.1. Founders

Every founder who is a natural person is a beneficial owner *ex lege* regardless of his or her specific rights or the nature and amount of the assets contributed.

2.7.2. Beneficiaries

The status of beneficiary, which is relevant for purposes of the BORA, can be based on
- identification as such in the foundation deed or the supplementary foundation deed,
- a determination by a body appointed for this purpose by the founder (Article 9 para. 1 no. 3 PSG), or
- a determination made by the management board of the foundation.

It is necessary for a specific person to already have attained the status of a beneficiary under Article 5 or Article 6 PSG. If the class of beneficiaries is circumscribed such that the persons included are identifiable and already have the status of beneficiary under the PSG, then these persons are also beneficiaries and to be reported as such.

Example: "My direct descendants shall be beneficiaries." Both children of the founder are already beneficiaries and must be reported to the Register. In addition, the class of beneficiaries ("The direct descendants of the founder") must be reported.

Persons who will not have the status of a beneficiary until the occurrence of a condition precedent are not to be reported. There is no obligation to report such a person to the Register until the condition occurs (and the person holds the position of beneficiary within the meaning of the PSG). Before this, such persons have a mere contingent right and are not to be reported. If these persons, as an exception, receive a one-time benefit of more than EUR 2,000 per calendar year – without obtaining permanent beneficiary status – they must be reported as one-time beneficiaries.

Example: "My direct descendants shall be beneficiaries when they reach the age of 18." Both children of the founder are known by name. They will attain the status of beneficiary within the meaning of the PSG when they reach the age of 18. Therefore, the children need not be reported to the Register until they reach the age of 18. The class of beneficiaries ("The direct descendants of the founder when they reach the age of 18") must always be reported. If the children receive an early benefit from the foundation of more than EUR 2,000 per calendar year, they must be reported as one-time beneficiaries in the relevant calendar year.

Final beneficiaries, i.e. those who are entitled to the remaining assets after the liquidation of the private foundation, are also beneficiaries under Article 6 PSG and must be reported to the Register.

2.7.3. Class of beneficiaries

Under Article 2 no. 3 lit. a sublit. bb BORA, a class of beneficiaries must be reported if the persons who are to receive benefits are described in the abstract or can be identified based on the purpose of the foundation (e.g. all residents of Municipality XY) and the affected persons do not attain beneficiary status until they are identified by a body appointed by the founder for this purpose (Article 5 PSG). If persons in this class are identified as beneficiaries and thereby attain permanent beneficiary status, they must additionally be reported as beneficiaries.

Example: "Persons who have their place of residence in Municipality XY are to receive a benefit if they are selected by the management board of the foundation." The class of beneficiaries must be reported ("residents of Municipality XY"). A person selected must be reported as a one-time beneficiary (if he or she receives a one-time benefit of more than EUR 2,000 per calendar year) or as a beneficiary if the person attains beneficiary status within the meaning of the PSG.

Example: "The management board of the foundation shall select beneficiaries from among my descendants." The descendants are not yet beneficiaries within the meaning of the PSG. They only attain beneficiary status if they are selected by the management board of the foundation. A person selected must be reported as a one-time beneficiary (if he or she receives a one-time benefit above EUR 2,000 per calendar year) or as a beneficiary if the person attains beneficiary status within the meaning of the PSG.

2.7.4. One-time beneficiaries

If persons in the class of beneficiaries only receive one-time benefits from the private foundation, the value of which exceeds EUR 2,000 in a calendar year, they shall be deemed to be beneficiaries in the relevant calendar year. This report is only valid for the relevant calendar year and is only visible under historical data in the next calendar year. In this case, it is not necessary for the legal entity to issue a change report.

If a person is not selected as beneficiary with a one-time benefit until December, under Article 5 para. 1 no. 3 final sentence BORA, the legal entity has four weeks from its awareness of this to send a change report. The legal entity is entitled to take the change of year into account in applying this deadline and to issue a change report in January of the following year. In such cases, the data reported regarding the beneficiary with the one-time benefit will be included for the year just past.

If beneficiaries do not receive cash benefits, but benefits in the form of rights of use (e.g. with respect to apartments) or transfers of devices free of charge, such as valuable musical instruments ("Stradivarius"), there is a reporting requirement if the fee that would commonly be paid by a third party exceeds EUR 2,000 per calendar year. However, the requirement to determine the fee that would commonly be paid by a third party should not be overstated. There are no concerns if a report is sent to the Register in doubtful cases.

Persons, who receive benefits of EUR 2,000 or less in a calendar year need not be reported.

2.7.5. Members of the management board of the foundation

In addition, the members of the management board of the foundation shall be identified with the aid of a Commercial Register excerpt and reported. The management board of the foundation is generally a collegial body subject to a limitation that representation must be provided by two or more persons jointly (*Doppel- oder Mehrfachvertretungsbefugnis*). However, under the definition, each member is always a beneficial owner *per se*.

2.7.6. Treatment of legal entities as founders or beneficiaries

If a founder or a beneficiary is a legal entity, it must be determined whether a natural person exercises control over this legal entity (since the legal entity is considered the second level). If so, this person is to be reported under Article 2 no. 3 lit. a sublit. dd BORA as the person who ultimately controls the private foundation by other means. If this is not the case and there are no other founders or beneficiaries, no person is to be reported as the founder or beneficiary.

2.7.7. Other natural persons who ultimately control the private foundation by other means

The foundation auditor in his/her function as the prescribed controller does not come within the scope of Article 2 no. 3 lit. a sublit. dd BORA. Likewise, an advisory council does not come within the scope of this provision, unless it is entitled to exercise broad rights to influence and alter legal relationships, instead of the usual rights, so that it meets the prerequisites of Article 2 no. 3 lit. a sublit. dd BORA.

"Control by other means" can only be based on specific legal relationships, e.g. appropriate rights conferred by the foundation deed. If a legal entity exercises control over the private foundation, it must ultimately be determined whether the legal entity is under the control of a natural person (see Article 2.3.8.).

2.7.8. Performance of multiple functions by a single person

If a founder is also a beneficiary of the private foundation, he or she must be reported as both founder and beneficiary on the reporting form.

2.7.9. Reporting requirement under Article 5 PSG

The reporting requirement under Article 5 PSG is not abolished by the BORA. However, it is scheduled for elimination in a future amendment to the PSG.

2.7.10. Charitable private foundations

With charitable private foundations, an individual beneficiary can typically not be identified, and the beneficiary is often the general public. In this case, the class of beneficiaries that corresponds to the purpose of the foundation is to be reported to the Register and, if benefits are paid to specific natural persons, they are to be reported to the Register as one-time beneficiaries.

2.7.11. Special private foundations

With specially regulated private foundations, which, on the one hand, inherently pose a low risk of money laundering and terrorism financing and, on the other hand, usually have numerous beneficiaries, individual beneficiaries need not be reported to the Register. Instead, for these foundations, the class of beneficiaries as such is to be reported to the Register. Under Article 2 no. 3 lit. a sublit. bb BORA, this relates to private foundations under Article 66 VAG 2016, savings bank foundations under Article 27a SpG, foundations established for the purpose of supporting the entity under Article 4d para. 1 EStG 1988, foundations established for the purpose of supporting employees under Article 4d para. 2 EStG 1988 and foundations for the purposes of profit-sharing by workers and employees under Article 4d para. 3 and 4 EStG 1988.

2.8. Charitable foundations and funds

Article 1 para. 2 no. 15 BORA covers all foundations and funds under Article 1 BStFG 2015, the assets of which are designated by a private law deed of dedication (*Widmungsakt*) for the purpose of undertaking tax-privileged tasks, as long as, by their purpose, they go beyond the field of interests of an Austrian Federal State and were not autonomously administered by the Federal States before the amendment to the Austrian Federal Constitutional Law (B-VG) apportioning responsibilities between the Federal Government and the Federal States (1 October 1925). These legal entities are already recorded in the Register of Foundations and Funds.

Article 1 para. 2 no. 16 BORA covers foundations and funds, which, for example, pursue charitable or benevolent purposes and do not go beyond the field of interests of a Federal State, because, for example, they assist needy persons who are domiciled in a specific Federal State. Such foundations and funds can be established on the basis of State laws and are to be recorded in registers at the State level.

This Federal Act shall only apply to foundations and funds established under State law if this is provided for by State law, e.g. by a static reference to this Federal Act (in the introductory clause). Otherwise, the entire Federal Act does not apply to foundations and funds established under State law. However, it should be noted that inclusion within the scope of the Federal Act is already in process and should be completed by 2 May 2018.

With respect to foundations and funds under Article 1 para. 2 nos. 15 and 16 BORA, Article 2 no. 3 lit. b BORA provides that the founders, the members of the foundation or fund management board, the class of beneficiaries and any other natural persons who ultimately

control the foundation or fund by other means must be reported as beneficial owners. If a founder has already died, only the first and last name must be reported. If specific natural persons receive (one-time) benefits from such a foundation or fund, they are not to be reported.

In general, there is greater freedom to design the organisational structure of charitable foundations and funds. If governing bodies are established in addition to those mentioned above, it must be determined whether the rights of the foundation or fund management board have been significantly curtailed and whether the additional governing body is able to ultimately control the foundation or the fund by other means (see Article 2.3.8.).

2.9. Trusts and arrangements similar to trusts

If a legal entity is a trust managed from within Austria or if there is an arrangement similar to a trust, which is comparable to a trust in function and structure, it is necessary for proper reporting to the Register that the trust or arrangement similar to a trust be recorded in the Supplementary Register for Others. Under Article 3 para. 4 BORA, the trustee or person comparable to a trustee must ensure that the trust or arrangement similar to a trust is recorded in the Supplementary Register for Others and, if necessary, must file an application for recording in the Supplementary Register for Others.

If the trust is not recorded in the Supplementary Register for Others, the reporting requirement is violated. This constitutes a financial offence and, if intentional, is punishable under Article 15 para. 1 BORA by a fine of up to EUR 200,000 or, if based on gross negligence (Article 15 para. 2 BORA), is punishable by a fine of up to EUR 100,000.

The trust shall be recorded in the Supplementary Register via the Data Protection Authority of the Republic of Austria (see www.dsb.gv.at). To be recorded, the legal entity or its governing bodies must prove the legal existence and legally valid name of the trust. The following information must be included in any written application:

- name, address and registered office of the applicant,
- legal nature or organisational form of the applicant,
- name of the documents and/or legal provisions used to prove the legal existence of the applicant (proof of existence),
- date of founding or other formation and duration of existence if the trust is time-limited,
- there is no need to name the bodies authorised to represent the trust to third parties and the persons who perform these functions.

The appropriate form for new applications is available for download on the homepage of the Data Protection Authority. After recording in the Supplementary Register for Others, the legal entity must keep the information up to date. For any changes, there is a separate form available in the company service portal (*Unternehmensserviceportal*). The legal entity or its governing bodies can obtain additional information regarding recording in the Supplementary Register for Others on the homepage of the Data Protection Authority (www.dsb.gv.at).

The persons specified in the definition in Article 2 no. 2 BORA are the beneficial owners of trusts and arrangements similar to trusts under Article 1 para. 2 no. 17 and no. 18 BORA based on the performance of their functions.

For trusts and arrangements similar to trusts, this includes the following persons or groups of persons in all cases based on their functions:

- the settlor/trustor;

- the trustee(s);
- the protector (if any);
- the beneficiaries or, where the individuals that are the beneficiaries of the trust have yet to be determined, the group of persons in whose interest the trust was established or operated (class of beneficiaries); if persons belonging to this group receive benefits from the trust that exceed the value of EUR 2,000 in a calendar year, then they shall be considered to be beneficiaries in the calendar year in question;
- any other natural person exercising ultimate control over the trust by other means.

If persons in the class of beneficiaries receive benefits from the trust, the value of which exceeds EUR 2,000 in a calendar year, the same provisions as for private foundations apply for reporting these beneficiaries of trusts.

The procedure for identifying and reporting the beneficial owners of a trust is as follows:
- Step 1: First determine whether the trust is being administered in Austria. This is the case, in particular, if the trustee has his/her place of residence or registered office in Austria.
- Step 2: If the trust is being administered in Austria, the trust or arrangement similar to a trust under Article 3 para. 4 first sentence BORA must be recorded in the Supplementary Register for Others.
- Step 3: Then, the beneficial owner is to be verified and identified by examining the deed of trust or a similar document, which indicates the beneficial ownership, or a synopsis of the relevant documents. Copies of the documents should be retained as proof.
- Step 4: The beneficial owners must be reported to the Register of Beneficial Owners.

It should be emphasised that the aforementioned persons are always considered beneficial owners based on the performance of their functions and must be reported, even if another person has ultimate control over the trust.

If a function is performed by a legal entity, rather than a natural person, the procedure in Article 2.7.6 must be followed.

2.10. Secondary determination

It is only permissible to make a secondary report of the top level of management under Article 2 no. 1 lit. b BORA if no natural persons can be identified as beneficial owners after exhausting all possible means. Therefore, before making a secondary report, it must be determined whether no beneficial ownership can be identified under the criteria set forth in Article 2 BORA.

Under Article 2 no. 1 lit. b sublit. aa BORA, for ordinary partnerships and limited partnerships with only natural persons as partners, the managing partners are the beneficial owners, unless there is evidence that the partnership is under the direct or indirect control of one or more other natural persons.

In the case of commercial and industrial cooperative societies in which no member holds a cooperative share of more than 25% and no grounds exist to indicate that the commercial and industrial cooperative societies are directly or indirectly under the control of one or more other natural persons, the members of the top level of management (management board or management) shall be considered to be the beneficial owners (Article 2 no. 1 lit. b sublit. bb BORA).

In the case of companies without owners, the natural persons who belong to the top level of management shall be considered to be beneficial owners, provided that no grounds exist to indicate that the company is either directly or indirectly under the control of one or more other natural persons (Article 2 no. 1 lit. b sublit. cc BORA).

The term "top level of management" is always the top operative management level of the reportable legal entity.

If the top level of management of a legal entity consists of legal entities (in part), the natural persons at the top level of management who are authorised representatives of the legal entities with representation authority shall be identified as (secondary) beneficial owners. Therefore, in this case, the focus is not on the beneficial owners of the legal entity with representation authority. If, for example, a GmbH & Co KG is the reportable legal entity and the GmbH, which is the general partner, is exclusively entrusted with management and if no beneficial owners can be identified, the managing directors of the GmbH shall be identified as secondary beneficial owners, and not its own beneficial owners.

2.10.1. Exhaustion of all possible means

If, after exhausting all possible means, reportable legal entities come to the conclusion that there is no natural person who meets the criteria of Article 2 no. 1 lit. a BORA, then the natural persons who are members of the top level of management of the legal entity shall be reported to the Register as secondary beneficial owners. The identification and verification of a secondary beneficial owner is only permissible as a last resort and after exhausting all possible means to determine the identity of the beneficial owner. The steps taken by the reportable legal entity shall be documented to prove this to the registry authority.

In some cases, a reportable legal entity may be dependent on the cooperation of its legal and beneficial owners to fulfil its due diligence requirements under Article 3 BORA. Therefore, under Article 4 BORA, they are required to provide all necessary documents and information. If the legal and/or beneficial owners refuse to provide the necessary documents, the reportable legal entity shall verifiably inform its owners of their duty to cooperate under Article 4 BORA and of the penalty provisions applicable to them under Article 15 BORA.

If the reportable legal entity is ultimately unable to identify its beneficial owners due to a lack of cooperation by the owners and despite exhausting all means, the members of the top level of management shall be reported to the Register as secondary beneficial owners – since a report must be made to the Register in any case.

In this regard, it should be noted that this procedure does not prejudice fulfilment of the due diligence requirements of obliged entities under other supervisory laws (e.g. the FM-GwG).

2.10.2. Grounds for suspicion

It should be noted that the term "grounds for suspicion" within the meaning of Article 2 no. 1 lit. b first sentence BORA has no importance for reportable legal entities. The term "grounds for suspicion" is only relevant to obliged entities, if their respective occupation-specific due diligence requirements make reference to the definition in Article 2 BORA.

3. Due diligence obligations of legal entities in relation to their beneficial owners

3.1. Identification and verification of beneficial owners

Article 3 BORA governs the due diligence obligations of legal entities in relation to their beneficial owners. Legal entities are required to determine the identities of their beneficial owners and to take appropriate measures to verify their identities, so that they are convinced they know who their beneficial owners are. This provision includes taking appropriate measures to understand the ownership and control structure. The procedure for identifying beneficial owners is explained in detail on the following pages.

The process for identifying direct and indirect beneficial owners is as follows:

- Step 1: First, the reportable legal entity must identify its direct owners. If a natural person holds a shareholding of more than 25% of the legal entity or more than 25% of the shares or voting rights or exercises direct control over the legal entity (including by way of a trusteeship agreement (Treuhandschaft), this person is a direct beneficial owner. If a natural person holds a shareholding of less than 25% of the legal entity or less than 25% of the shares or voting rights of the legal entity and does not control it by other means, the natural person is not a beneficial owner within the meaning of Article 2 BORA, unless additional shares can be attributed to this person based on other participations.
- Step 2: If a legal entity holds more than 25% of the shares of the reportable legal entity or a participation in excess of 25%, the owners of the legal entity shall be determined to be the indirect beneficial owners of the reportable legal entity. It should be kept in mind that the owners of the respective legal entity must generally also be checked if their participations are less than 25% of the legal entity, since shares or participations of different legal entities holding less than 25% must be aggregated if they are controlled by the same natural person or persons (see Article 2.3 for further details regarding the control concept). Therefore, it is necessary to understand the ownership and control structure so that the indirect beneficial owners and ultimate legal entities can be identified.

3.1.1. Obligations of legal and beneficial owners

Article 4 BORA provides legal relief to reportable legal entities since their legal and beneficial owners are required to provide the reportable legal entity with all documents and information necessary for them to meet the due diligence requirements.

3.1.2. Documents necessary to meet due diligence requirements

Under Article 3 para. 2 BORA, reportable legal entities are required to retain copies of the documents and information necessary for compliance with due diligence requirements under Article 3 para. 1 BORA for at least five years after the beneficial ownership by the natural person has ended. This includes all proofs of the ownership and control relationships of the legal and beneficial owners of the reportable legal entity and all documents needed to verify the identities of the beneficial owners.

As part of their due diligence requirements, reportable legal entities must take "appropriate measures" to verify the identities of their beneficial owners. This includes appropriate measures to understand the legal entity's ownership and control structure. This means that, in the case of indirect beneficial ownership, the reportable legal entity must also understand

the basis for the person's status as indirect beneficial owner. Knowledge of the links in the chain between the reportable legal entity and the beneficial owner is a necessary element.

To meet the due diligence requirements, the legal entity must obtain the appropriate proofs customary in the particular country with respect to beneficial owners or the ownership and control relationships. Sources of such information include publicly available register excerpts and non-public documents (articles and bylaws or similar contracts used to establish the legal entity). Since the ultimate legal entity must also report basic information to the Register, the proofs customary in the particular country should at least contain the following information:

- name of the legal entity;
- legal form;
- identification register and identification number (if available);
- address of the legal entity's registered office (street name, house number, place, postal code and country code).

If the relevant register excerpts so not indicate the owners of the legal entity or if such register excerpts or non-public documents are not available under the practices of the respective country, other proofs customary in the particular country regarding the beneficial owners or the ownership and control relationships should be utilised. Such other documents and information can be utilised if they come from reliable and objective sources of information (e.g. annual financial statements, database queries or [Internet] research). Therefore, the types of necessary proofs can differ from each other depending on the legal entity's corporate form and country of registration.

If the reportable legal entity cannot obtain copies of the necessary documents, then inspecting the relevant documents and making file notes will suffice. A complete file note must contain the date and place of the inspection, the signature and identity of the person who made the inspection, the exact names of the documents inspected and who created or issued and signed the documents and what his/her function was and the precise content of the documents (particularly the names of the beneficial owners and the nature and scope of the beneficial ownership).

Basically, the reportable legal entity must determine whether, based on the documents available, it has secure knowledge of who its beneficial owners are. If necessary, the reportable legal entity must take additional measures to determine and verify this.

The documents utilised to identify the beneficial owners can also be used to verify their identities as part of the legal entity's due diligence requirements. The legal entity must take appropriate measures to verify its beneficial owners. Which measures are "appropriate" depends on the specific case.

The following measures are generally "appropriate" and therefore necessary:

- Inspection and copying of commercial registers or comparable registers and articles and bylaws;
- Inspection and copying of foundation deeds and supplementary foundation deeds or deeds of trust;
- Obtaining passport copies or copies of other official photo identification documents of foreign nationals;
- Obtaining information regarding existing control relationships of relevant legal and beneficial owners, inspecting relevant contracts (syndicate agreements, trusteeship agreements (Treuhandschaft) and the like) and making copies or file notes.

3.2. Time periods under the due diligence requirements

Under Article 3 para. 3 BORA, reportable legal entities must meet the due diligence requirements of Article 3 para. 1 BORA at least once per year and determine whether the list of beneficial owners reported to the Register is still up-to-date. However, the exact date for this can generally be established by the legal entity (e.g. when the annual financial statements are audited). However, the maximum interval between due diligence investigations is one year. Irrespective of the annual due diligence requirements to which reportable legal entities are subject, there is no obligation to confirm the Register status if there have been no changes since the last report.

4. Reporting of data by the legal entity

If the legal entity is not exempted from the reporting requirement (Article 6 BORA), it is required by Article 5 BORA to report its beneficial owners to the registry authority. Data regarding direct and indirect beneficial owners and ultimate legal entities must be sent to the *Unternehmensserviceportal* on the appropriate reporting form.

Reportable legal entities must report their beneficial owners for the first time within four weeks of their first recording in the respective identification register (Commercial Register, Register of Associations or Supplementary Register for Others). Trusts and arrangements similar to trusts must do so within four weeks of the establishment of trust administration in Austria. Changes to the reported information must be sent within four weeks of awareness of the change (Article 5 para. 1 BORA).

4.1. Direct beneficial owners

The following data regarding direct beneficial owners must be ascertained and reported (Article 5 para. 1 no. 1 BORA):

- first and last names;
- if the person has no place of residence in Austria, the number and type of official photo identification document;
- place and date of birth;
- nationality;
- place of residence;
- nature and scope of the beneficial interest.

Persons with a reported primary residence in Austria need only provide their first and last names and date of birth. For these persons, any changes in the aforementioned information will be automatically adopted through a comparison with the Central Residence Register. An update is only necessary if the person gives up his or her primary residence in Austria.

If the person has no primary residence in Austria, proof of identity (a copy of a photo identification document) must also be uploaded (Article 5 para. 2 BORA).

4.2. Indirect beneficial owners

The following information regarding the ultimate legal entity must also be reported for indirect beneficial owners (Article 5 para. 1 no. 2 BORA):

- if the ultimate legal entity is a legal entity under Article 1 BORA, its identification number, as well as its holding in terms of number of shares, voting rights or the holding of the beneficial owner in the ultimate legal entity;
- if the ultimate legal entity is a legal entity comparable to one defined in Article 1 BORA, with its registered office in another Member State or a third country, the name and address of the registered office of the legal entity, the legal form, the identifiers that correspond to the identification number and the identification registry as well as the holding of shares, voting rights or the holding of the beneficial owner in the ultimate legal entity.

4.3. Proof of the identity of the beneficial owner

No proof of identity is necessary for direct or indirect beneficial owners with a primary residence in Austria. When the full name and date of birth are entered, there will be an automatic comparison with the Central Residence Register and the persons entered therein can be clearly identified in this way. In these cases, it is not necessary or technically possible to provide proof of identity as an attachment to the report.

Under Article 5 para. 2 BORA, direct or indirect beneficial owners with no primary residence in Austria must upload the photo identification document provided when the beneficial owner's data was input, in addition to the personal data on the beneficial owner. The purpose of this is to clearly identify the beneficial owner, and it also contributes to improving data quality in reporting on beneficial owners.

A legal entity may identify a natural person with no place of residence in Austria as a beneficial owner and the latter may refuse to send a copy of an official photo identification document. In such cases, the legal entity must verifiably ask the beneficial owner to send a copy of an official photo identification document and point out the owners' obligation under Article 4 BORA and the penal provisions of Article 15 BORA, which apply to the reportable legal entity if there is a violation of the reporting requirement. If the beneficial owner still refuses to send a copy of an official photo identification document, the actual existence of the beneficial owner can be proven by other means. Such proof can be provided e.g. by a certified copy of the photo identification document or an excerpt from an official register (e.g. personal information regarding the beneficial owner from the Residence Register, Register of Persons, census authority or probative evidence of the ultimate legal entity from a register comparable to the Commercial Register if it contains complete information regarding the beneficial owner). The relevant proofs must be uploaded as other proof of identity, instead of a copy of the identification document.

However, it should be noted that the lack of an official photo identification document for a beneficial owner with no primary residence in Austria generally meets the objective test for a violation of the reporting requirements under Article 15 para. 1 and 2 BORA. Nevertheless, in general, if the governing bodies of a reportable legal entity follow the aforementioned procedure, there will be no presumption of wrongful intent or gross negligence on their part. However, the legal or beneficial owner who does not meet his/her obligations under Article 4 BORA may be subject to criminal responsibility as an aider and abettor. In addition, the financial offences under the BORA can result in the levying of a fine against the legal entity under Article 28a FinStrG (Fiscal Penalties Act).

4.4. Deceased beneficial owners

4.4.1. If the beneficial owner is already deceased as of the reporting date

If a beneficial owner is already deceased when the report is made to the Register, he/she must still be reported to the Register as a beneficial owner. In this case, only the first and last name, the existence of a fiduciary relationship and the nature and scope of the beneficial interest of the deceased beneficial owner must be reported (Article 5 para. 1 no. 1 final sentence BORA). This will enable correct reporting if, for example, founders are already deceased when a private foundation makes its report or if probate proceedings for a deceased beneficial owner have not yet been completed. When the probate proceedings have been completed and the heirs have received their shares of the business, they are to be reported to the Register as the beneficial owners, instead of the deceased person, if they hold a sufficient percentage of shares, participations or voting rights of the legal entity or exercise control over it.

The death certificate or a devolution decision (*Einantwortungsbeschluss*) are examples of documentary proof that the founder can be excluded as a beneficial owner. However, it is not necessary or technically possible to electronically transfer the proof together with the report. The relevant proof need only be presented in the case of an audit by the registry authority.

4.4.2. If the beneficial owner dies after the report is made

If the beneficial owner is a person reported to the Register as having a primary residence in Austria and this person dies in Austria, the data will be automatically taken from the Central Residence Register, and no change report is necessary. The data cannot be taken automatically if a person dies in a foreign country and this fact is not recorded in the Central Civil Registry. In such cases, the legal entity is required to make a report to the Register within four weeks of becoming aware of the death. If a change report is issued, it will be evident whether an automatic data transfer has already occurred.

It is only necessary to send a change report to the Register if the deceased beneficial owner was reported to the Register as having his/her primary residence abroad since, in this case, the data cannot be automatically adjusted. The change report is to be issued within four weeks of becoming aware of the death of the beneficial owner. When selecting the place of residence of the beneficial owner on the change report, the item entitled "deceased" is to be selected.

The dormant estate is a legal entity (Article 546 ABGB (Austrian Civil Code)) and is represented by those heirs who have declared their acceptance of the inheritance or by a court-appointed estate trustee.

However, the dormant estate is not a legal entity within the meaning of Article 1 para. 2 BORA. The dormant estate itself is not reportable and cannot be an ultimate legal entity. In general, the deceased person remains the beneficial owner for the duration of the probate proceedings.

After the close of the probate proceedings and the transfer of the rights of the dormant estate to the heirs in the event of devolution (Article 547 ABGB) or to a creditor in the case of transfer in lieu of payment (Article 798 ABGB), the legal entity is required to report the new beneficial owner(s) to the Register, unless the legal entity is exempt from the reporting requirement.

If the probate proceedings are conducted abroad or in Austria based on the deceased person's choice of law under a foreign inheritance statute, the legal entity must also report the new beneficial owners to the Register after the transfer of rights to the heir(s) within four weeks of becoming aware of this.

It may be that, after the death of a beneficial owner, other natural persons must be reported to the Register as beneficial owners since they exercise control by other means or because the rights of the deceased do not pass to the dormant estate and therefore other persons become beneficial owners.

If the dormant estate is represented by the heirs who have declared their acceptance of the inheritance, it must be determined whether they can exercise control, since appointments of managing directors or appointments or removals of supervisory body members may fall within this period. Therefore, in an individual case, the heirs who have declared their acceptance of the inheritance can become beneficial owners with respect to the shares of the business or capital shares in the dormant estate.

4.5. Incorrect or incomplete reports

Under Article 5 BORA, if a report is not made or not made in full, the tax authority can compel compliance by imposing a coercive penalty under Article 111 BAO.

If several governing bodies of a reportable legal entity are called upon to meet the reporting requirements, the responsibility for financial offences is primarily determined by the internal allocation of responsibilities. If there is no such allocation or if the allocation of responsibilities is not clear in this area, all the governing bodies authorised to represent the legal entity shall be liable.

Anyone who fails to report specific reportable information or documents regarding the beneficial owners or the ultimate legal entities to the Register shall also be guilty of a financial offence and, in the case of wrongful intent, may be punished by a fine of up to EUR 200,000; in the case of gross negligence, the guilty party may be punished by a fine of up to EUR 100,000.

5. Exemption from the reporting requirement

Exemption from the reporting requirement under Article 6 BORA reduces the administrative burden on the reportable legal entity in those cases where data can be automatically taken from existing registers, such as the Commercial Register.

If there is an exemption from the reporting requirement, the system will automatically recognise this and note it on the reporting form. Legal entities are free to make a report at any time despite the exemption from the reporting requirement. In this case, the legal entity must actively waive the exemption from the reporting requirement on the reporting form before a report on its beneficial owners can be issued.

It should be kept in mind that the exemption from the reporting requirement lapses if another person exercises control over the legal entity. The exemption from the reporting requirement always lapses if one of the beneficial owners of the legal entity, which has been exempted from the reporting requirement, cannot be found among the beneficial owners who were automatically taken from an existing register. The lapse of the exemption from the

reporting requirement cannot be recognised automatically since it occurs due to circumstances that are not recorded in the Commercial Register, Register of Associations or Supplementary Register.

However, the exemption from the reporting requirement does not lapse if too many persons are taken from the Commercial Register as beneficial owners, as long as the actual beneficial owners within the meaning of Article 2 BORA are among them.

In particular, with partnerships, it is possible that more persons will be taken into the Register as beneficial owners than can be identified through the partnership agreement based on their capital shares. As long as the actual beneficial owners are among those automatically taken, this lack of precision will be accepted for reasons of administrative simplification.

Moreover, an exemption from the reporting requirements does not mean an exemption from the due diligence requirements of Article 3 BORA. As part of the annual due diligence requirements, the legal entity must determine whether circumstances have occurred that have resulted in a lapse of the exemption from the reporting requirement (e.g. exercise of control).

If no report is made, based on an exemption from the reporting requirement, even though another natural person exercises direct or indirect control over management, there is a breach of duty under Article 15 BORA.

6. Inspection of the Register

Obliged entities, competent authorities, natural persons and organisations with a verifiable legitimate interest can obtain excerpts from the Register of Beneficial Owners. This is so that the primary purpose of the Register – to contribute toward preventing money laundering and terrorism financing – can be fulfilled. The excerpts shall be designed to readily facilitate the identification and verification of beneficial owners. However, it should be noted that the data recorded in the Register is not scrutinized before recording and therefore one cannot rely on the accuracy of the data.

6.1. Inspection by obliged entities

Obliged entities within the meaning of the Article 9 para. 1 BORA are:
1. credit institutions pursuant to Article 2 no. 1 FM-GwG and insurance undertakings pursuant to Article 2 no. 2 lit. b FM-GwG;
2. credit institutions and financial institutions pursuant to Article 2 no. 1 and no. 2 FM-GwG, that are supervised by the FMA pursuant to Article 25 para. 1 FM-GwG, to the extent that they are not included under no. 1;
3. financial institutions pursuant to Article 2 no. 2 FM-GwG, that are not supervised by the FMA pursuant to Article 25 para. 1 FM-GwG;
4. holders of government-approved licences pursuant to Article 14 and Article 21 GSpG;
5. authorised operators of gaming machines and betting companies that have been established on the basis of an authorisation under regional law, in accordance with the regulations set out under regional law;
6. attorneys;
7. notaries;

8. external auditors pursuant to Article 1 para. 1 no. 1 WTBG 2017 (Public Accountants' Statute of Professional Practice of 2017; *Wirtschaftstreuhandberufsgesetz 2017*);
9. tax advisors pursuant to Article 1 para. 1 no. 2 WTBG 2017;
10. balance sheet accountants, accountants and payroll accountants pursuant to Article 1 BiBuG 2014 (Balance Sheet Accounting Act of 2014; *Bilanzbuchhaltungsgesetz 2014*);
11. commercial traders including auctioneers, provided that they accept payments in cash of at least EUR 10,000 pursuant to Article 365m1 para. 2 no. 1 GewO 1994 (Austrian Trade Regulation Act of 1994; *Gewerbeordnung 2014*);
12. real estate agents pursuant to Article 365m1 para. 2 no. 2 GewO 1994;
13. business consultants pursuant to Article 365m1 para. 2 no. 3 GewO 1994;
14. insurance brokers pursuant to Article 365m1 para. 2 no. 4 GewO 1994;
15. the Austrian Treasury (*Österreichische Bundesfinanzierungsagentur*).

The Register shall be inspected by way of an excerpt bearing an official signature of the registry authority or an extended excerpt, which can be retrieved from the Federal *Unternehmensserviceportal*.

Where there are outsourcing or representational relationships under which the outsourcing services provider or representative is considered a part of the obliged entity (e.g. Article 15 FM-GwG), based on a contract, the services provider or representative shall be entitled to inspect the Register under the contract using the obliged entity's access to the *Unternehmensserviceportal*.

For this purpose, the obliged entity can designate responsible persons of an outsourcing services provider or a representative as users of the *Unternehmensserviceportal*.

6.1.1. Inspection in the application of due diligence requirements to customers

The term "obliged entities" was taken from Directive (EU) 2015/849 and applied to the BORA. Under Article 9 para. 2 BORA, obliged entities may inspect the Register if they are subject to the provisions for the prevention of money laundering and terrorism financing in Austria and have their registered offices in Austria. In general, for reasons of data protection, obliged entities may only inspect the Register in the application of their due diligence requirements for the prevention of money laundering and terrorism financing to customers.

In applying the due diligence requirements to a customer as a reportable legal entity, one may inspect all legal entities that are in a close beneficial or legal relationship with the customer and therefore are relevant to determining the beneficial ownership of the customer or its ownership and control structure. An inspection is also permissible if, when investigating a transaction by a customer that raises suspicions of money laundering and terrorism financing, the beneficial owner of the customer's transaction partner must be identified.

The term "customer" relates to the definition applicable to the obliged entity under relevant substantive laws (e.g. Article 2 no. 15 FM-GwG). However, the term "customer" also includes persons with whom specific talks regarding the establishment of a business relationship are conducted, since the due diligence requirements of identifying and verifying beneficial owners must be met before establishing a business relationship. It should be noted that it is permissible to inspect the Register after contacting a customer with whom there is a prospect of establishing a business relationship. It is not permissible if no contact has been made with the customer. For example, it is not permissible to determine who the beneficial

owners of a customer are before contacting the customer. Anyone who intentionally inspects the Register without authorisation within the meaning of Article 9 para. 2 BORA is guilty of a financial offence, which is punishable by a fine of up to EUR 10,000 under Article 15 para. 3 BORA.

In addition, attorneys, notaries, external auditors, tax advisors, balance sheet accountants, accountants and payroll accountants may also inspect the Register on behalf of their clients if this is necessary for the purpose of advising their clients with respect to the identification, verification and reporting of beneficial owners of their clients.

The obliged entity shall conduct its inspection by retrieving an excerpt bearing an official signature of the registry authority pursuant to Article 9 para. 4 BORA or an extended excerpt pursuant to Article 9 para. 5 BORA. It is only possible to retrieve an excerpt for a specific legal entity (by providing the full name of the legal entity or the relevant identification number) or a specific natural person. In general, only credit institutions and certain obliged entities (Article 9 para. 1 nos. 1, 4 and 6 to 10 BORA) can search for a particular natural person, since they are subject to a professional non-disclosure requirement. Moreover, the natural person must be clearly identified by entering one or more other identifiers in addition to his/her name.

Under Article 11 para. 1 BORA, obliged entities may not solely rely on the information regarding the beneficial owners of a legal entity contained in the Register in applying their due diligence requirements to customers but must use a risk-based approach to meeting their due diligence requirements. Obliged entities can find the relevant measures in the appropriate FMA circulars.

6.1.2. Disclosure of excerpts from the Register

The restrictions on inspection of the Register include the restriction that excerpts and the information in the excerpts may only be disclosed under certain conditions. Disclosure is permissible in the following cases:

- In the case of application of the due diligence requirements of obliged entities under Article 11 para. 2 BORA, where it is necessary to disclose the excerpt to the customer (e.g. to verify with the customer whether there are any control relationships or fiduciary relationships that differ from the information in the extended excerpt).
- If the due diligence is being conducted by a third party, the third party may send the information and the excerpts to the relevant obliged entity (e.g. Article 13 para. 1 FM-GwG).
- Where there are outsourcing or representational relationships under which the outsourcing services provider or representative is considered a part of the obliged entity (e.g. Article 15 FM-GwG), based on a contract, the services provider or representative may send the information and the excerpts to the relevant obliged entity.

6.2. Inspection where a legitimate interest exists

Based on data protection law considerations, the Beneficial Owners Register was established in accordance with the requirements of the 4th Anti-Money Laundering Directive as a non-public register.

In addition to obliged entities (Article 9 BORA) and authorities (Article 12 BORA), natural persons and organisations may also submit a written request to inspect the Register to the registry authority with regard to the beneficial owner of a specific legal entity under Article 10 BORA by providing the legal entity's identification number. In the request, the applicant

must prove that there is a legitimate interest in conjunction with the prevention of money laundering and terrorist financing in relation to this legal entity. Therefore, a request for inspection can only be made with respect to a specific legal entity.

Under Article 11 para. 3 BORA, another pre-condition is for the applicant to have included an obligation in its statutes or mission statement to conduct activities to prevent money laundering and terrorist financing, to be able to prove specific successful activities for the prevention of money laundering or terrorist financing, or to itself be an obliged entity pursuant to Directive (EU) 2015/849.

In addition, the specific contribution that the requested excerpt can make towards the prevention of money laundering or terrorist financing must be proven. The last pre-condition corresponds to the restriction placed on obliged entities that they may only request excerpts in the performance of due diligence.

If, after examining the application, the registry authority concludes that the interest expressed by the natural person or organisation is legitimate, the latter will receive an excerpt from the Register with an official signature by the registry authority with the following information:

- name of the legal entity and address details;
- the legal entity's identification number and identification register;
- the legal form and information about the period of time for which the legal entity has been in existence;
- first and last name, date of birth and country of residence of the beneficial owners;
- information on whether the beneficial interest is based on a capital share, membership in senior management, the performance of a function or the exercise of control.

For reasons of data protection and the protection of the interests of the beneficial owners, the excerpt will not be a full excerpt from the Register but will only show part of the data from the Register.

The decision of the registry authority that there is no legitimate interest of the applicant shall be served in the form of a notice. Appeals against decisions by the registry authority may be filed with the Federal Fiscal Court (*Bundesfinanzgericht*).

6.3. Ban on disclosing information

Article 9 para. 4 final part BORA governs the ban on disclosing information under the Associations Act 2002 and the Residence Reporting Act 1991.

If there is a ban on disclosing information under the Associations Act 2002, then the excerpt shall only contain the name of the association, its identification number (ZVR number) and information that the registered office of the association is located in Austria as well as a remark that information is not allowed to be disclosed. This restriction shall not apply to obliged entities under Article 9 para. 1 nos. 1, 2, 7 and 14 BORA. For them, the excerpt shall only contain the country of residence of the direct and indirect beneficial owners, instead of the place of residence, and a notice that there is a ban on disclosing information under the Associations Act 2002. If a search is conducted for the natural persons who are the beneficial owners of an association for which the disclosure of information is banned, this association is not be allowed to be displayed in the list of hits returned.

If there is a ban on disclosing information under the Residence Reporting Act 1991, the excerpt will only contain information that the place of residence is in Austria, instead of information on the places of residence of the direct and indirect beneficial owners, as well as a remark that there is a ban on disclosing information under the Residence Reporting Act.

The disclosure to third parties of data records labelled as subject to a ban on disclosing information constitutes a financial offence under Article 15 para. 4 BORA and is punishable by a fine of up to EUR 30,000.

Federal Ministry of Finance, 26 April 2018