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

This decree reflects the legal opinion of the Federal Ministry 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 to be omitted in administrative decisions.

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1 Scope of application

1.1 General provisions

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 and 5th Anti-Money Laundering Directive and the Register for Trusts and Arrangements Similar to Trusts within a single central register. On this basis, the Beneficial Owners Register was established as of 15 January 2018 and is operated by the Federal Ministry of Finance as the Register Authority.

In supplement to this decree, the Register 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. The list of countries maintained by the Federal Ministry of Finance is likewise published there – see Article 6.4.6 (Legal form-specific proof and country-specific information).

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 (Private Foundations Act, *Privatstiftungsgesetz*);
- other legal entities, required to be entered into the Commercial Register pursuant to Article 2 no. 13 FBG (Commercial Register Act, *Firmenbuchgesetz*);
- associations pursuant to Article 1 VerG (Associations Act, *Vereinsgesetz*);
- foundations and funds pursuant to Article 1 BStFG 2015 (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 or, if their administration is not located within Austria or another Member State, if the trustee commences a business relationship or acquires real property on behalf of the trust 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, or, if their administration is not located within Austria or another Member State, if the person comparable to a trustee commences a business relationship or acquires real property on behalf of the arrangement of a similar nature to a trust within Austria. Administration within Austria shall in particular be deemed given if the holder of authority comparable with a trustee (trustee) shall have its domicile 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
- churches, legal entities under ecclesiastical law (e.g. foundations established under canon law and recognised religious associations)
- political parties

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, or, if the administration is not located within Austria or in another Member State, whether a business relationship is being established or (one or more) property/properties is/are or was/were acquired within Austria on behalf of the trust. See Article 2.9 (Trusts and arrangements similar to trusts).

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*) do not apply to the BORA.

Pursuant to Article 1 para. 2 BORA, **publicly-quoted stock companies** likewise fall within the scope of 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 and legal entities pursuant to Article 1 para. 2 BORA that are controlled by publicly quoted companies must be identified under the provisions of Article 2 BORA and reported to the Register.

2 Definition of a "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:

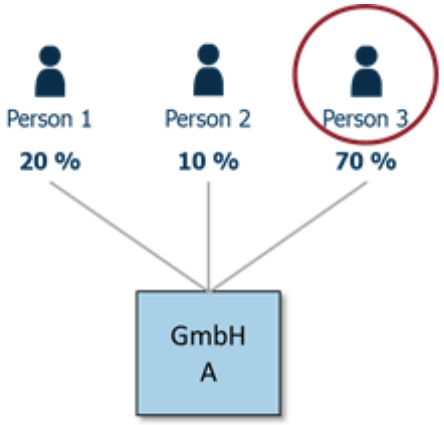
- **Direct beneficial ownership** exists where a natural person holds *a shareholding or voting rights of more than 25%* or *a participation of more than 25%* of the company *or one or more natural persons jointly exercise direct control over the company*.
- **Indirect ownership** exists where a legal 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 reportable

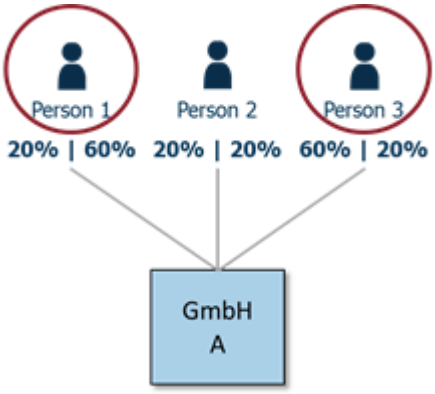
company and one or more natural persons who jointly exercise direct control over the reporting company.

> ***Example of direct ownership:*** P*erson 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 right.

> ***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%).*



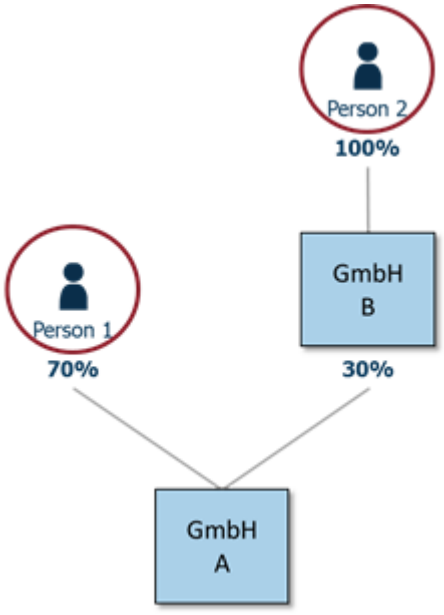
2.2 Indirect ownership

Indirect beneficial ownership under Article 2 no. 1 lit. a sublit. bb BORA exists where

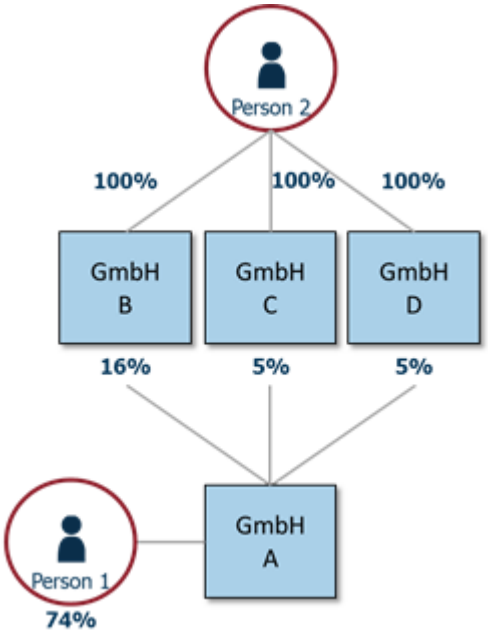
- one or more natural persons jointly exercise direct or indirect control over a legal entity, which, in turn, holds a percentage of the shares, participations or voting rights of the reportable legal entity of more than 25% (Variant 1).
- If multiple legal entities, which are directly or indirectly 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.*



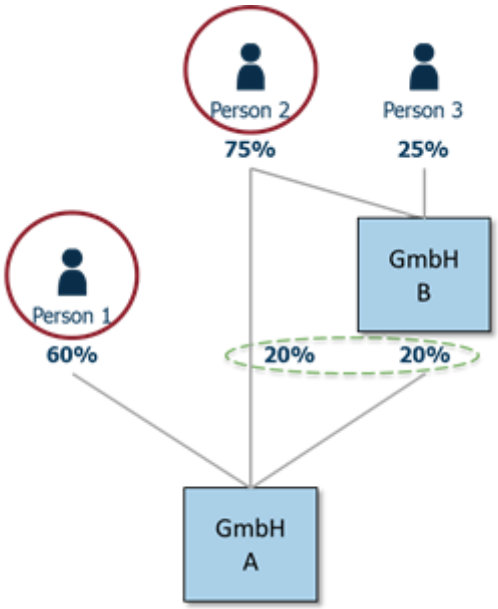
Example of indirect ownership (Variant 2)*: Person 2 holds an indirect interest in GmbH A through participations in GmbH B, GmbH C and GmbH D. Therefore, Person 2 is the indirect beneficial owner of GmbH A, since he/she directly controls several legal entities, which, in the aggregate, hold more than 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 Inclusion of directly held shares of indirect beneficial owners / aggregation of direct and/or indirect shares

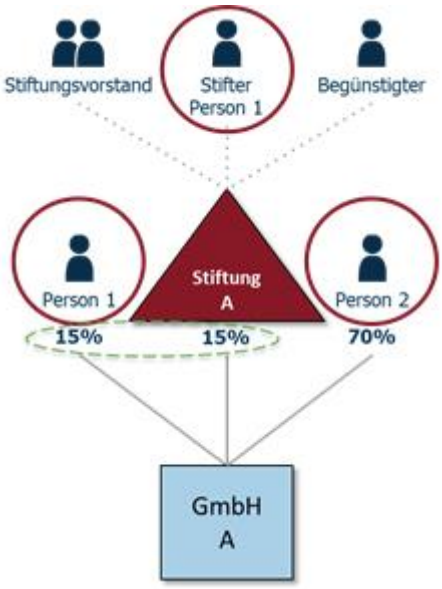
In calculating the shares and participations of natural persons, directly held shares must always be added to indirect shares in accordance with Article 2 no. 1 lit. a sublit. bb third sentence BORA. This addition must always be done at the same level of participation. The relevant person can be reported as a direct and indirect beneficial owner if the prerequisites for direct and indirect ownership are met. If the relevant person does not have a direct share which is sufficient, then that person can only be reported as an indirect beneficial owner.

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.*



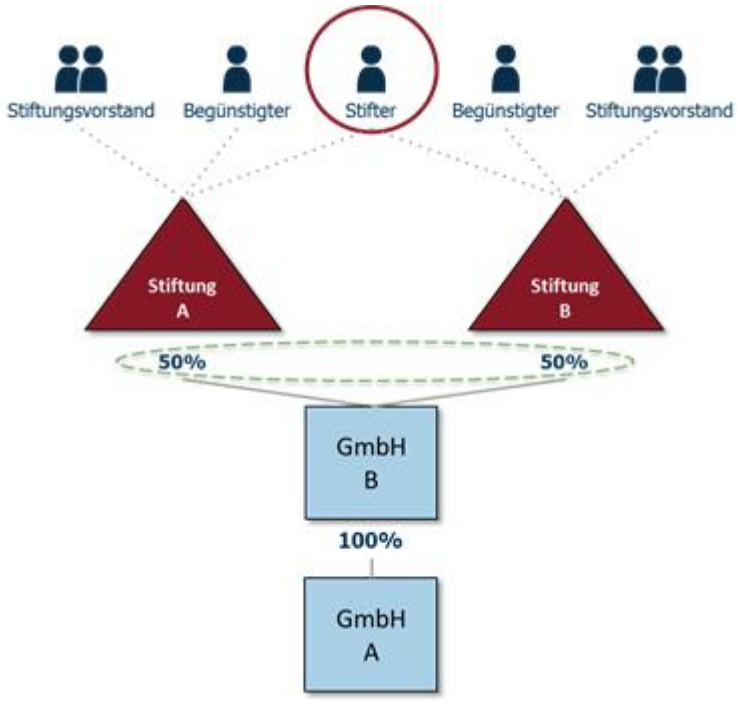
If a person performs a function for a private foundation that holds an interest in a reportable legal entity, the shares directly held by this person are to be added to the shares of the private foundation. However, this does not affect the beneficial ownership of the other persons who perform functions for the private foundation. Thus, in such cases, the private foundation should, for technical reasons, not be reported as the ultimate legal entity if its registered office is located within Austria (reporting it as the ultimate legal entity would automatically cause the other persons to be included). 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, for technical reasons, the private foundation is not reportable as the ultimate legal entity if the registered office of the private foundation is located within Austria. In such cases, 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 if its registered office is located within Austria (reporting it as the ultimate legal entity would cause all of the other persons to be automatically included).

> ***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. As a result of this, the founder becomes an indirect beneficial owner of GmbH A with Private Foundation A and Private Foundation B as the ultimate legal entities. However, in the case of Austrian private foundations, for technical reasons the founder is to be reported as the direct beneficial owner. With respect to the nature and scope of the beneficial ownership, in this case "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 may also be based on the exercise of control over the company. 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, or
  - 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; or
- based on an relevant trust agreement (*Treuhandschaft*) or comparable legal agreement can exert influence on the trust property (percentage of the shares, participation).

Mere participation in the profits and/or losses of a company does not, on its own, establish any control.

2.3.1 Pooled voting rights and syndicate agreements

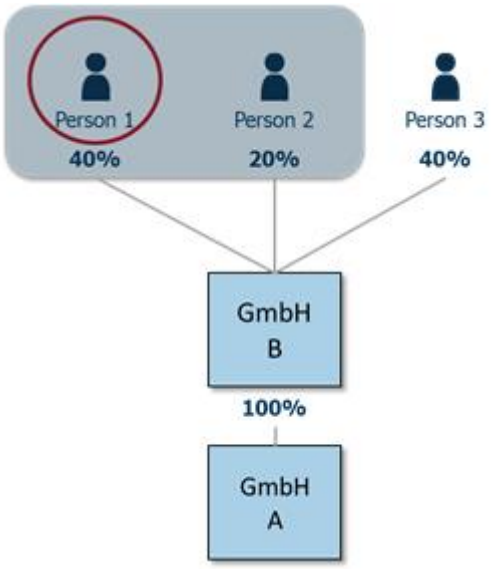
A syndicate agreement between the shareholders/partners of an existing or yet-to-be founded corporation or partnership is an additional contractual agreement, which supplements the law or the articles and bylaws. The pooling of voting rights as a component of this agreement can enable the formation of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

A major difference from Article 244 para. 2 UGB consists of the fact that all of the members of the consortium are beneficial owners even if, internally within the consortium, they do not hold the majority of voting rights.

2.3.3 Establishing control through trusteeships (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 with respect to direct and indirect owners and within a chain of participations. Likewise, a trusteeship 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) 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.

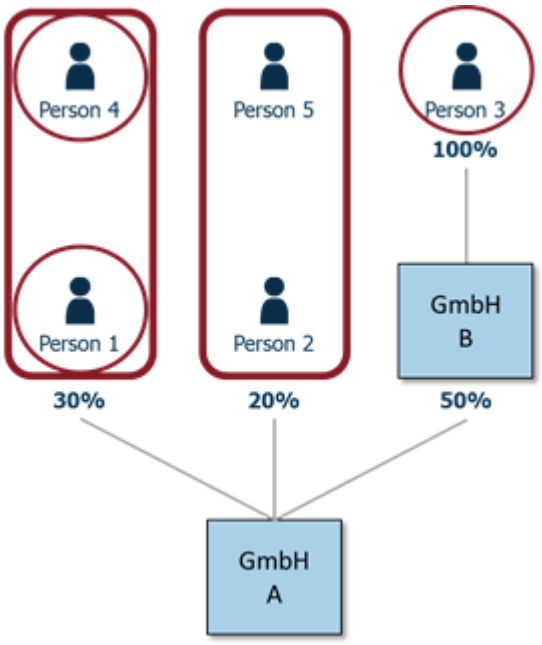
If the settlor/trustor is a legal entity, it must be determined whether natural persons, who are on a higher level than the legal entity, are beneficial owners based on the control relationship. If, for example, a private foundation, a charitable foundation or a fund, a trust or an arrangement similar 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

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 relevant trusteeship relationship exists and whether the beneficial owner is a trustee or settlor/trustor. A relevant trusteeship relationship will be deemed present if a trusteeship relationship or similar legal relationship is present on the basis of which a natural person becomes the beneficial owner of the reportable legal entity and the beneficial owner in question is a party to the trusteeship or similar legal relationship.

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. In this case, a beneficial owner standing behind the trusteeship is not a party to the trusteeship, for which reason, when reporting on such natural persons, the existence of a trusteeship relationship should be reported in the negative.

> ***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, cannot make this person a beneficial owner.

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 Article 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, legal entities under ecclesiastical law (e.g. foundations established under canon law) or recognised religious groups also fall outside 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 (Corporation under public law)).

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 (*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.

Article 2 no. 1 lit. a BORA makes expressly clear that natural persons who ultimately control the company "by other means" are also beneficial owners. The following statements also apply *mutatis mutandis* to Article 2 nos. 2 lit. e and 3 lit. a sublit. dd) and lit. b sublit. dd) BORA. On the reporting form, "control" should be selected with respect to the nature and scope of the beneficial interest of such persons.

Control "by other means" can be established in various ways, either legally or by *de facto* circumstances. 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 control "by other means" if they are designed so that these persons can exercise direct influence over key business decisions. All decisions relating to profit distributions or decisions leading to a transfer of assets to the party with controlling influence 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 option-like assignment agreement with the shareholder, which permits the future purchase of the company's shares at a price that is significantly below market. The spouse who is the managing director can exercise control "by other means" 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 superordinate legal entities have control "by other means" if there is clear and objective evidence that supports the existence of control "by other means". The evidence must be documented. Mere rumours or assumptions are not sufficient.

Control "by other means" can result in an additional beneficial owner if a natural person exercises control in this sense. If a legal entity exercises control "by other means", 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 of the Stock Corporation Act 1965 (*Aktiengesetz*, AktG), shares must be registered shares except in the cases set forth in Article 10 para. 1 AktG. Under Article 10 para. 1 AktG, 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 AktG under the company's articles and bylaws. In these cases, under Article 10a paras. 1 to 4 AktG, 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 may be 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.

As an alternative to this, for bearer shares of publicly quoted stock companies whose shares are traded on a multilateral trading system, one may use a print-out from an international information provider such as Bloomberg, Thomson Reuters, SIX Financial Information, Fact-Set Research Systems, Morningstar or the like in order to determine and verify the beneficial owners (see also Article 6.2.3.2 (Stock companies and European companies)).

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

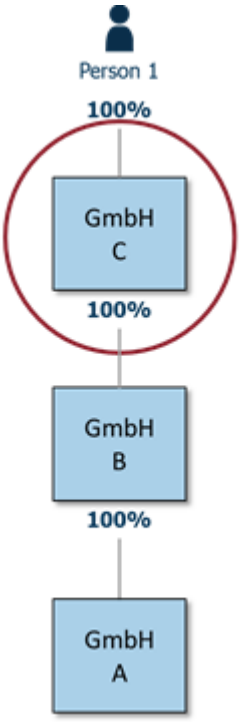
- those legal entities in a chain of participations that are directly controlled by indirect beneficial owners and
- those legal entities in which indirect beneficial owners directly hold shares or a participation, if these, considered with the legal entity/entities mentioned above, constitute beneficial ownership. If, when viewed in isolation, these shares do not suffice but must be aggregated with other indirectly controlled shares, this will also 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 in a third country.

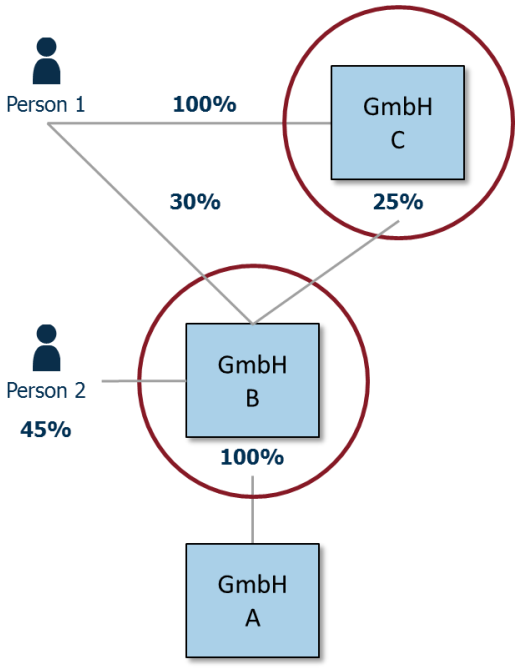
An association or an ownerless company for which the top level of management was reported as secondary beneficial owners under Article 2 no. 1 lit. b BORA cannot be an

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.

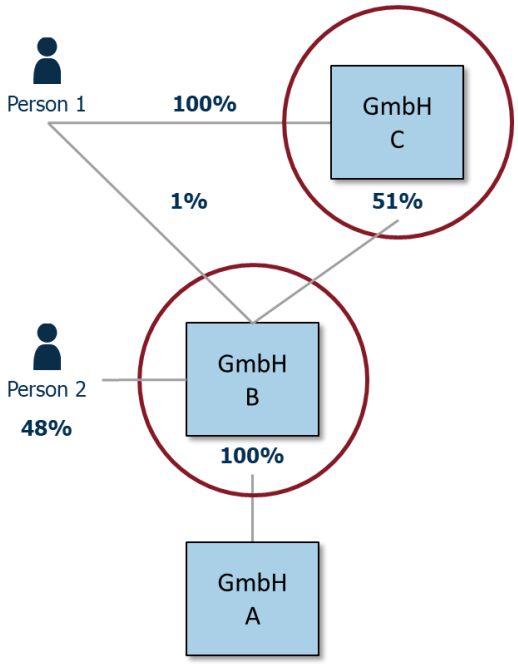
Example of an ultimate legal entity (Variant 1): *The ultimate legal entity of GmbH A is GmbH C, since the latter is directly controlled by Person 1 and therefore indirectly establishes the beneficial ownership of GmbH A by Person 1. The ratio of beneficial ownership of the ultimate legal entity should be stated as 100%.*



Example of an ultimate legal entity (Variant 2a): *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 (share of ultimate legal entity: 30%) and GmbH C (share of ultimate legal entity: 100%).*

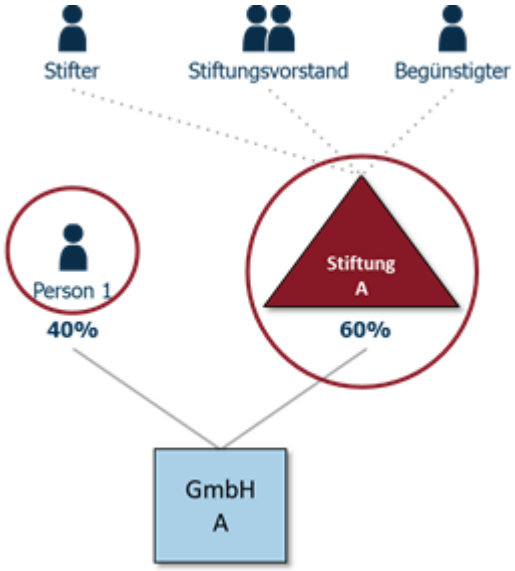


Example of an ultimate legal entity (Variant 2b): *The direct participation in GmbH B held by beneficial owner, Person 1, is not sufficient on its own to establish the beneficial ownership of Person 1. However, it should be aggregated with the indirectly held shares, which will establish the beneficial ownership of Person 1. Therefore, the ultimate legal entities are GmbH B (share of ultimate legal entity: 1%) and GmbH C (share of ultimate legal entity: 100%).*



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, which has a 60% share and thus has a sufficiently direct participation in GmbH A, is the ultimate legal entity. On the*

reporting form, the word "control" should be selected in relation to the foundation as 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 (because its reporting data will be automatically imported from the register from the report on the Austrian private foundation).



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 suitable for determining the individual partner's participations. It should also be noted that the presentation of the relevant participation structure in extended excerpts, and the calculated beneficial owners, are in each case shown in equal shares, in accordance with the rule applicable in the event of any doubt pursuant to Article 109 para. 1 UGB, and is thus likewise not suitable for determining the participation of a shareholder. 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 any event, 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 directors 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 control "by other means".

2.6.3 Assignment agreements

The existence of an assignment agreement, which only 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 control "by other means". Control will also be found if an assignment agreement becomes operative and grants the beneficiary substantial rights, but no entry thereof in the Commercial Register takes place.

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 control "by other means".

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)

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. As a basic principle, the parents of the minors or the guardians of adults are not beneficial owners and should not be reported to the Register.

In this context, it is also important to note the option of restricting inspection for the protection of minor age and beneficial owners lacking legal capacity pursuant to Article 10a BORA. See Article 7.3 (Restriction of inspection).

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 without such persons being granted permanent beneficiary status (see

Article 2.7.2 (Beneficiaries)), they shall be considered one-time 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 such exists). 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, the members of the management board of the foundation and the beneficiaries 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. The status of founder does not end upon the death of the founder; deceased natural persons are also *ex lege* founders and as such must be reported under BORA.

The same applies to natural persons who have revocably or irrevocably waived their founder's rights, since only a waiver of the founder's rights is possible, but not a waiver of the founder's status as such, and Article 2 no. 3 lit. a sublit. aa BORA refers to the founder's status.

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. A class of beneficiaries is a group of persons from whom the beneficiaries are selected based on a separate determination (Article 5 PSG). This group may be described in abstract terms or may be identified based on the purpose of the foundation. What is decisive is that 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. This report must be submitted by no later than the end of January of the following year; thereafter, it shall no longer be possible to file a report for the previous year. It should be noted that if the said deadline is missed, this may constitute a violation of the reporting obligation, in respect of which only self-disclosure pursuant to Article 29 FinStrG (*Finanzstrafgesetz*, Fiscal Penalties Act) may secure exemption from a potential penalty.

The legal entity is entitled to also avail itself of this period at the end of the year and correspondingly only to submit a change report in January of the following year. In such cases, the data reported on the beneficiary receiving a one-time benefit will be imported for the previous year.

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

Where, in the case of an Austrian private foundation, a founder, a beneficiary, an ultimate beneficiary or a one-time beneficiary is a legal entity, then the exercise of control "by other means" pursuant to Article 2 no. 3 lit. a sublit. dd BORA will be assumed, solely on the basis of the status in question (founder, beneficiary, ultimate beneficiary and one-time beneficiary). If one of the aforementioned statuses is held by a legal entity, then the beneficial owner(s) of that legal entity must be ascertained, so that the natural persons ultimately exercising control within the meaning of BORA over the private foundation are always reported as beneficial owners (see Decree RV 1660, supplement to the stenographic report of the National Council (*BlgNr.*) 25. GP 6f).

By way of next step, it is therefore necessary to determine whether one or more natural person(s) exercises control within the meaning of Article 2 para. 1 lit. a, final section BORA over this legal entity which has one of the above-referenced statuses (since the legal entity is considered the second level). If so, then this/these natural person(s) must be reported under Article 2 no. 3 lit. a sublit. dd BORA as the person or persons who ultimately control(s) the private foundation "by other means". If this is not the case and there are a no other founders or beneficiaries, no person is to be reported as the founder or beneficiary.

Consequently, if an Austrian private foundation is the founder or beneficiary of another (subordinate) private foundation, the beneficial owners of the first private foundation are to be reported in accordance with the provisions set out above for the other (subordinate) private foundation, noting "exercise of control by other means".

If a private foundation establishing a foundation legally waives all rights of formation and founder rights and if this is recorded in the foundation deed, this may result in the private foundation which is creating the foundation no longer exercising control over the other/subordinate private foundation. In such case, the functionaries of the private foundation establishing another foundation will no longer be reported for the other private foundation as "exercising control by other means". However, it should be noted that even in the case of a legally effective waiver, control by other means may still be exercised, for example, due to factual circumstances such as identical individuals or close family relationships (see also section 2.3.8 (Exercise of control "by other means")). In addition, it should be noted that the statements made here with regard to the existence of beneficial ownership will have no effect on the due diligence obligations of the obliged entity, in particular with regard to verifying the origin of funds under other supervisory laws, which must be complied with independently of the obligation to ascertain and verify beneficial

owners (e.g. pursuant to Article 6 para. 1 no. 4 FM-GwG; Article 8f para. 5 RAO (*Rechtsanwaltsordnung,* Attorneys' Code); Article 36f para. 5 NO (*Notariatsordnung*, Notarial Code); Article 90 no. 5 WTBG 2017 (*Wirtschaftstreuhandberufsgesetz,* Act regulating the Profession of Chartered Accountants). In this context, particular attention must also be paid to taking a risk-based approach.

In the case of non-profit foundations and funds pursuant to Article 1 para. 2 nos. 15 and 16 BORA, foreign foundations, trusts or comparable legal entities, the procedure for ascertaining beneficial owners is analogous to the procedure described above if a functionary pursuant to Article 2 no. 2 or no. 3 BORA is a legal entity.

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 be based on specific legal relationships, e.g. appropriate rights conferred by the foundation deed, or from factual circumstances. See Article 2.3.8 (Exercise of control "by other means").

If a legal entity exercises control by other means over the private foundation, it must ultimately be determined whether the legal entity is under the control of a natural person.

2.7.8 Performance of multiple functions by a single person

If one natural person performs multiple functions, then that person must be reported as the beneficial owner for each of these functions. If, for example, 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 totalling more than EUR 2,000 per calendar year 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).

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 will 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 (opening clause).

However, it should be noted that the federal provinces have all made use of the opening clause and have submitted the foundations and funds established under provincial law to BORA.

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 (Exercise of control "by other means")).

2.9 Trusts and arrangements similar to trusts

A trust within the meaning of Article 1 para. 3 BORA is the legal arrangement created by a person (the settlor/trustor) by *inter vivos* transaction or by disposition *causa mortis*, under which assets are subjected to the supervision of a trustee in favour of a beneficiary or for a particular purpose; the trust itself may also have legal capacity. A trust within the meaning of BORA has the following features:

1. The assets of the trust constitute a separate fund and do not form a part of the trustee's personal assets;
2. the rights with regard to the trust assets are held in the name of the trustee or another person representing the trustee;
3. the trustee has the authority and the obligation, in respect of which an account must be rendered, to manage, utilise or dispose of the assets in line with the terms of the trust and the special obligations imposed on him by law.

The fact that the settlor/trustor reserves certain rights and powers to himself or that the trustee himself has rights as a beneficiary is not necessarily an obstacle to the existence of a

trust. In addition, the existence of a trust under the aforementioned definition cannot be restricted by individual rights and powers of the trustor or the trustee.

An arrangement similar to a trust is another arrangement, such as *fiducie*, certain types of trusts or *fideicomisio,* provided if they are comparable to a trust in function or structure. As a basic premise, trusteeships are not included under the definition 'arrangements similar to a trust', since such arrangements are typically not comparable to trusts in structure and function. However, if a trusteeship, due to its contractual structure, provides for the management of assets in favour of a person who is not identical to the trustor (beneficiary), then in the individual case, it shall be necessary to determine whether an arrangement similar to a trust is present.

Pursuant to Article 3 para. 4 BORA, the rights and obligations under this Federal Act in the case of a trust are incumbent on the trustee, and in the case of an arrangement similar to a trust, on the person comparable to the trustee. In particular, such persons are also subject to the obligation to determine whether an arrangement similar to a trust is present.

If the legal entity is a trust or an arrangement similar to a trust, then the trustee or person comparable to a trustee must disclose their status to obliged entities pursuant to Article 3 para. 4 BORA if such entities fulfil due diligence obligations *vis-à-vis* their clients, and must provide information on the beneficial owners of the trust or arrangement similar to a trust in a timely manner when entering into a business relationship or conducting an occasional transaction above the threshold amounts (e.g. pursuant to Article 5 no. 2 lit. a and lit. b FM-GwG; Article 8b para. 1 no. 2 RAO; Article 36b para. 1 no. 2 NO; Article 87 para. 2 no. 10 WTBG 2017). Failure to comply with these obligations constitutes a tax offence under Article 15 para. 1 no. 5 and is punishable by fine of up to EUR 200,000 in cases involving intentional act or by a fine of up to EUR 100,000 in cases involving gross negligence.

Furthermore, the trustee of a trust under Article 1 para. 2 no. 17 BORA and the person comparable to a trustee of an arrangement similar to a trust under Article 1 para. 2 no. 18 BORA have a duty to file a report on beneficial ownership unless this obligation is waived under Article 3 para. 5 BORA. For proper reporting to the Register, it is necessary that the trust or arrangement similar to a trust be recorded in the Supplementary Register for Others (ERsB). 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, then this will subsequently give rise to a violation of the reporting requirement, to which the potential fines referred to above will apply under Article 15 para. 1 BORA.

Entry in the Supplementary Register is via the Source PIN Register Authority (*Stammzahlenregisterbehörde*) (Link). 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.

Entry may be actioned directly via the Source PIN Register Authority using the application form for entry in the Supplementary Register for Others in the "Forms" service section. The appropriate form for new applications is available there for downloading. After entry 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*). Further information regarding recording in the Supplementary Register for Others may be obtained on the website of the Federal Ministry for Digital and Economic Affairs (www.bmdw.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 or of an arrangement similar to a trust is as follows:

- Step 1: First, determine whether the prerequisites of Article 1 para. 2 no. 17 or no. 18 BORA are fulfilled.
- Step 2: If the prerequisites of Article 1 para. 2 no. 17 or no. 18 BORA are fulfilled and no exemption is given under Article 3 para. 5 BORA, then the trust or arrangement similar to a trust under Article 3 para. 4 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 similar document, which indicates the beneficial ownership, or a synopsis of the relevant documents. Copies of the documents should be retained as proof or may be forwarded to the Register as a compliance package pursuant to Article 5a para. 1 no. 2 lit. f in the course of performing Step 4.
- Step 4: The beneficial owners must be reported to the Beneficial Owners Register.

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 or arrangement similar to a trust.

If a function is performed by a legal entity, rather than a natural person, the procedure in Article 2.7.6 (Treatment of legal entities as founders or beneficiaries) 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 there is no beneficial owner present (Article 5 para. 1 no. 3 lit. b,

Variant 1 BORA) or if no beneficial owners can be identified after exhausting all possible means (Article 5 para. 1 no. 3 lit. b Variant 2 BORA). 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 (Article 5 para. 1 no. 3 lit. b Variant 2 BORA)

If, after exhausting all possible means, reportable legal entities are unable to determine or verify any natural person as beneficial owner, 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 Register 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.

In this context it is relevant for purposes of determining the relevant further course of action to identify whether or not the documents and information which are specifically required are publicly available.

If they are publicly available, then the reportable legal entity must in such event procure the documents and information, even without involvement of the beneficial owners (see also Article 3.2 Duties of legal and beneficial owners), in order to be in a position to determine and verify the beneficial owners.

If they are not publicly available and if the reportable legal entity is 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, and the option "Exhaustion of all possible means" should be selected in the reporting form. See Article 4 (Reporting of data by the legal entity).

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 Obligation of legal entity to identify and verify its 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 in Article 3 below.

In simplified terms, the process for identifying direct and indirect beneficial owners is as follows:

- **Direct beneficial owners:** 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 (*Treuhandschaft*); for more precise details on the definition of control, see Article 2.3 (Control)), 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.
- **Indirect beneficial owners:** 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 holding such shares must be determined. If the owners in question are natural persons and hold a participation in excess of 50% or exercise control, then they must be noted as

indirect beneficial owners. It should be borne in mind that shares or participations of different legal entities holding less than 25% must be aggregated if the latter are controlled by the same natural person or persons. Therefore, it is necessary to understand the full ownership and control structure so that indirect beneficial owners and ultimate legal entities can be identified. For this reason, it may be necessary to verify the owners of the respective legal entity even if the participation constitutes less than 25% of the reportable legal entity.

The obligation to determine and verify the beneficial owners pursuant to Article 3 para. 1 BORA is incumbent on the reportable legal entity and its respective officers and directors.

3.2 Duties 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. The provision of information on beneficial owners by the latter alone is not sufficient, since the reportable legal entity must be placed in a position enabling it to discharge its due diligence obligations under Article 3 para. 1 BORA, which requires determination and verification of the beneficial owners.

In the event that legal and/or beneficial owners fail to fully comply with their obligation under Article 4 BORA, a distinction must be made according to whether or not the documents and information which are specifically required are publicly available.

The reportable legal entity shall be required to procure publicly available documents and information even without cooperation of the owners.

However, if the release of documents and information which are not publicly available is refused and if, despite exhausting all other means, the reportable legal entity is ultimately unable, due to lack of cooperation by the owners, to determine and verify its beneficial owners, then a secondary report by the ultimate management tier under Article 2 no. 1 lit. b BORA should be considered (see Article 2.10 Secondary determination).[1]

[1] However, for obliged entities under the Financial Markets Anti-Money Laundering Act (FM-GwG), it is necessary to refer to Article 7 para. 7 FM-GwG; see also FMA Circular on due diligence obligations to prevent money laundering and financing of terrorism 09/2018 (version of: 18.12.2018), margin nos. 257 et seqq. (in particular: margin no. 258).

This may be the case, for example, with respect to documents and information which are held exclusively by a superordinate legal entity or directly by the owners and therefore cannot be obtained by alternative means, or if no proof of deviating voting rights or control arrangements can be obtained because, for example, in the case of superordinate foreign legal entities, the relevant equity structure cannot be reconstructed, and/or confirmation of the superordinate or ultimate legal entity as required in an individual instance is refused (see list in Article 6.3 (Documents relating to superordinate Austrian legal entities)).

3.3 Determination and verification of beneficial owners by professional party representatives

Pursuant to Article 5 para. 2 BORA, legal entities may also appoint professional party representatives pursuant to Article 5 para. 1 no. 2 of the Austrian Business Service Portal Act (*Unternehmensserviceportalgesetz*, USPG) to report their beneficial owners. In addition, legal entities may also appoint professional party representatives to determine and verify the beneficial owners. If this is the case, this must be stated in the report filed under Article 5 para. 1 no. 4 lit. a BORA. If, on the other hand, a professional party representative has only acted in an assisting capacity, then it should not be stated that the beneficial owners were determined and verified by the professional party representative.

3.4 Reasonable steps to verify beneficial owners

As part of their due diligence obligations, 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.

This Article describes the measures which, if complied with, shall provide assurance to the effect that reasonable measures have been taken to verify the beneficial owners within the meaning of Article 3 para. 1 BORA. Another approach may also be appropriate, but this must be assessed on a case-by-case basis. This applies to cases where the beneficial owners were determined and verified by the reportable legal entity itself as well as to cases where the beneficial owners were determined and verified by a professional party representative.

Step 1: Determination of the relevant equity structure

By way of a first step, the relevant equity structure should be determined. For companies with domestic ownership structures, this may be done either by

- obtaining excerpts from the Commercial Register, Register of Associations or supplemental register for all levels of equity ownership or
- by obtaining one or more extended excerpts from the Register.

Obtaining an extended excerpt pursuant to Article 9 para. 5 BORA is recommended for professional party representatives, as it contains a presentation of the relevant domestic equity structure, calculated beneficial owners and ultimate legal owners, and directly and indirectly held shares are automatically aggregated. This applies regardless of whether a report has already been submitted to the Register.

For **the legal entity itself**, it is appropriate to obtain the documents pursuant to Article 5a para. 1 no. 2 lit. a to f BORA. If the beneficial owners are determined and verified by a professional party representative, then the management of the legal entity must be asked whether there are any voting rights or control relationships that deviate from the equity structure and would be relevant to determining beneficial ownership. See Article 6.2 (Documentary requirements).

For **Austrian intermediate levels and ultimate legal entities**, it is appropriate to obtain the documents pursuant to Article 5a para. 1 no. 2 lit. a to f BORA. These may also be obtained by inspecting a valid compliance package from the legal entity in question. See Article 6.3 (Documents relating to superordinate Austrian legal entities).

If there are **equity strands running to foreign countries**, then only the first foreign level of the relevant equity structure is shown in an extended excerpt from the Register. In these cases, the relevant foreign equity structure must be determined and documented (e.g. by preparing an organisation chart) on the basis of the evidence customary in the country, in particular (foreign) register excerpts comparable to the Austrian Commercial Register. In any case, it will be appropriate to obtain the documents pursuant to Article 5a para. 1 no. 4 lit. a to c BORA. See Article 6.4 (Documents relating to superordinate foreign legal entities). If a complete and valid compliance package can be retrieved from the Register for the last domestic level, determination and verification of the relevant beneficial owners can be carried out on the basis of the documents and evidence contained in that compliance package, by way of applying Article 11 para. 2a BORA, *mutatis mutandis*.

Step 2: Verifying whether there are deviations due to voting rights or control relationships

By way of a second step, it is necessary to verify whether relevant voting rights or control relationships exist which deviate from the respective equity structure or shareholding relevant to determination and verification of the beneficial owners. In this way, additional beneficial owners (see Article 2.3 (Control)) may be added.

Whether there are voting or control relationships which depart from the equity structures should be determined pursuant to Articles 6.2.5 (Trusteeships), 6.2.6 (Other proof and documents), 6.3 (Documents relating to superordinate Austrian legal entities) and 6.4 (Documents relating to superordinate foreign legal entities).

Step 3: Documentation

Copies of the documents and information as are required for the determination and verification must be retained for at least five years after the end of beneficial ownership by the natural person, pursuant to Article 3 para. 2 BORA (see Article 3.5 Retention obligations of legal entities).

Instead of inspecting the above-referenced documents, the reportable legal entity may also determine and verify beneficial owners by inspecting a file note pursuant to Article 5a para. 3 BORA. Thus, in any event, the retention of a file note that fulfils the requirements of Article 5a para. 3 BORA will also fulfil the retention obligation pursuant to Article 3 para. 2 BORA. By way of derogation from Article 5a para. 3 BORA, a file note may be used for these purposes irrespective of the existence of legitimate reasons. However, it should be noted that file notes must in any event be issued by the persons authorised to issue them pursuant to Article 5a para. 3 BORA (professional party representatives or suitable third parties, see Article 6.5 (File notes)) in order to permit them to be used to comply with the due diligence and retention obligations pursuant to Article 3 para. 1 and para. 2 BORA.

3.5 Retention obligations of legal entities

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 relevant proof of the ownership and control relationships of the legal and beneficial owners of the reportable legal entity as well as all relevant documents which were referred to in determining the identity of the beneficial owners.

By submitting a complete compliance package for a legal entity (see Article on Preparation of compliance packages), the retention obligation under Article 3 para. 2 BORA will be deemed to to have been complied with. It is thus essential that the compliance package be complete

at the time of submission. This means that the retention obligation for the duration of the validity of the compliance package will be considered met even if a submitted compliance package becomes invalid within the validity period.

There shall be no objections if the obligation under Article 3 para. 2 BORA is met by the reporting legal entities engaging a suitable third party as referenced in Article 5a para. 3 BORA for purposes of safeguarding the documents, which third party keeps the copies of the documents and information named in Article 3 para. 2 BORA for and on behalf of the reportable legal entity. In such cases, the reportable legal entity under Article 3 para. 2 BORA must take reasonable steps to ensure that the appropriate third party will be able to promptly forward to it upon request the information and documents it holds in custody on its behalf. Ultimate responsibility for discharging retention obligations remains with the legal entity which engages the suitable third party.

3.6 Timing of due diligence obligations

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. 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.

Article 5 para. 1, final sentence, BORA also stipulates that legal entities that are **not exempt from the reporting obligation under Article 6 BORA**, must report the changes identified during their review or confirm the reported data within four weeks after the due date of the annual review pursuant to Article 3 para. 3 BORA **(annual reporting obligation)**. Confirmation of the reported data shall be given by submitting a new report, but without changing the data which is pre-populated in the reporting form.

Legal entities that are **exempt from reporting under Article 6 BORA** do not have to submit an annual report. However, in connection with performing their annual due diligence (Article 3 para. 1 BORA) they must verify whether the requirements for the reporting exemption continue to be met.

Legal entities that have **submitted a secondary report with automatic data importing** (under Article 5 para. 5 BORA) will still be subject to the annual reporting obligation. They must check at least once per year whether the secondary reporting requirements are still met. If these conditions are still met, then this fact must be confirmed in the notification and it must be stated whether, after exhausting all possibilities, the beneficial owners could not

be determined and verified (Article 5 para. 1 no. 3 lit. b, Variant 1 or Variant 2 BORA). See remarks on secondary reporting in Article 4 (Reporting of data by the legal entity).

The due date of the annual report is generally governed by the date of the last annual verification under Article 3 para. 3 BORA.

Example: The initial report was submitted on 1 September 2018. The annual review was carried out the following year on the same date, i.e. 1 September 2019. The due date of the annual review in 2020 is 1 September 2020. The report must be submitted within four weeks of the due date of the annual review, i.e. by 29 September 2020. If the annual review is carried out at an earlier point, this does not result in a shortening of the reporting deadline, as this is determined by the due date for the annual review. However, care should be taken to ensure that the report is submitted promptly after completion of the annual review so that an incorrect report will not be submitted due to changes which have occurred in the interim.

Upon the return of the standardised form "Instructions for reporting of beneficial owners to the Register" signed on behalf of the client, the process of review can, in any event, be considered to have been completed.

Since the date of the annual review is not stored in the Register and must have taken place before or no later than on the date of the report, the date of the (last manual) report will be referenced for **automated coercive penalty proceedings**, so that in any event the statutory deadline is complied with. Since the last possible date for carrying out an annual review prior to the introduction of the annual reporting obligation was 9 January 2020, the automated coercive penalty proceedings for a breach of the annual reporting obligation cannot be initiated prior to 9 February 2021. In this context, it is necessary to examine whether the report entered on the Register at that time by a legal entity which is not exempt from the reporting obligations under Article 6 BORA has been maintained for longer than one year and four weeks.

Because there are, in principle, no objections to bringing forward the annual review date, a review of beneficial owners in the course of a change notification will also satisfy the requirements of the annual review. Therefore if, in the above example, a review and change notification takes place on 10 May 2020, then the period for the annual review should be recalculated from that reporting date. This must also accordingly be taken into account when coercive penalties are threatened or imposed.

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 Register Authority. Data regarding direct and indirect beneficial owners and ultimate legal entities must be sent to the *Unternehmensserviceportal* on the appropriate reporting form.

The electronic reporting form contains the following options under the heading "Type of report":

- Report of beneficial owners
- Secondary report of top-level management and
- Secondary report of top-level management with automatic data importing

On the page of the form entitled Details of report, it is possible to state whether a compliance package is also to be submitted together with the report (see Article 6 (Preparation of compliance packages)).

It should be noted that the "Secondary report of top-level management with automatic data importing" enables a report to be filed with automatic importing of the persons authorised to represent the company from the Commercial Register pursuant to Article 5 para. 5 BORA. If this option is selected, no data of secondary beneficial owners (members of the top-level management) can be entered, because these entries and potential changes to them are automatically imported from the Commercial Register.

If one of the two variants for secondary reporting of top-level management is selected, then it is compulsory to indicate whether the report is being made "after exhausting all possible means pursuant to Article 5 para. 1 no. 3 lit. b Variant 2 BORA". This may, in particular, be the case if the documents or information required for determination and verification of the beneficial owners could not be obtained, for example, because the provision of such documents was refused by the legal and/or beneficial owners. However, this option should not be selected if it was possible to determine and verify that there is no direct or indirect beneficial owner, for example, because there is no sufficient level of equity ownership present (no beneficial owner present pursuant to Article 5 para. 1 no. 3 lit. b, Variant 1 BORA).

4.1 Deadlines for reporting beneficial owners

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 or after establishing a business relationship or acquiring property within Austria. Changes to the reported information must be sent within four weeks of awareness of the change (Article 5 para. 1 BORA).

In respect of data of the legal entity itself which are entered on the identification register in question, one must in any event assume knowledge of those data from the date they were entered on the respective identification register. If events or facts already have impacts on the beneficial owners of a legal entity prior to entry in the main Register, then the commencement of the reporting period must be linked to the commencement of such effects.

Where an exemption from reporting under Article 6 is present, there will be no duty to report changes if the entry on the respective identification register is applied for within four weeks.

Legal entities which are not exempt from the reporting obligation under Article 6 must report changes determined in the course of their review within four weeks from the due date of the annual review under Article 3 para. 3 or confirm the data reported (annual reporting obligation).

The due date of the report to be filed as part of the annual reporting obligation is governed by the date of the most recent annual review pursuant to Article 3 para. 3 BORA (see Article 3.6 (Timing of due diligence obligations)). No objections will be raised if the timing of the reporting is brought forward for organisational reasons. However, the report must be carried out no later than four weeks from the date on which the annual review is due under Article 3 para. 3 BORA.

4.2 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).

4.3 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, and, where applicable, the class of beneficiaries in the case of a foreign ultimate legal entity pursuant to Article 2 nos. 2 and 3 BORA..

4.4 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, in the case of direct or indirect beneficial owners with no primary residence in Austria one 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. There will be no objection if, when reporting changes or reporting to confirm data reported following the annual review, a new copy of the photo identification document is not obtained and forwarded, provided that the photo identification document stored on the Register is still valid.

In the case of secondary reports of top-level management with automatic data importing pursuant to Article 5 para. 5 BORA, no proof of identity is required to be furnished, because in this case, the data entered on the Commercial Register will be relied on. If reportable data under Article 5 para. 1 no. 1 BORA are not entered on the Commercial Register, such as the direct or indirect beneficial owner's complete residential address, nationality or place of birth, there will nevertheless be no obligation to file a secondary report without automatic data importing since, under Article 5 para. 5 BORA, the report is only required to refer to the fact of secondary determination.

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 a copy 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, pursuant to the Corporate Criminal Liability Act

(*Verbandsverantwortlichkeitsgesetz*, VbVG), financial offences under BORA can result in levying of a fine against the legal entity under Article 28a FinStrG.

4.5 Deceased beneficial owners

4.5.1 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). As soon as 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 devolution decision (*Einantwortungsbeschluss*) are examples of documentary proof that the beneficial owner is already deceased. 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 Register Authority.

4.5.2 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, the data will be automatically imported from the Central Residence Register, and no change report is necessary. The data cannot be imported automatically if a person resident abroad dies 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.

This must be distinguished from cases in which beneficial ownership by a natural person is established by the exercise of a function by virtue of appointment, such as in the case of

members of the top level of management on whom a secondary report is filed or in the case of members of the foundation board of a private foundation. In the case of appointed functionaries, their function and thus beneficial ownership expires upon their death, so that such beneficial owners must be deleted from the Register by way of a change notification within four weeks of gaining knowledge of the death. If new functionaries are appointed in their place, then a report identifying them as beneficial owners within four weeks of the legally effective appointment will only be required if there is no automatic data importing form the Commercial Register (e.g. in the case of the new appointment of a member of the foundation board of a private foundation).

The dormant estate is a legal entity (Article 546 ABGB (*Allgemeines Bürgerliches Gesetzbuch*, General 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. If the dormant estate is entered in the Commercial Register, this will give rise to an automatic termination of an exemption of the reporting obligation under Article 6 paras. 1 and 2 BORA due to the fact that the legal entity has been entered as a shareholder (the dormant estate). Thus, in such cases a report under Article 5 BORA should be submitted.

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.

4.6 Responsibility for financial offences

If multiple directors or executives of a reportable legal entity are called upon to meet the reporting requirements, the responsibility for financial crimes and financial offences under Article 15 BORA is primarily determined by the internal allocation of responsibilities. If there is no such or if the allocation of responsibilities is not clear in this area, all of the officers and directors authorised to represent the legal entity shall be liable.

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. Exemption from the reporting requirement will in any event no longer apply if one of the beneficial owners of the exempted legal entity, which owner has been determined at the time of review, is not included among the beneficial owners automatically imported 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. In such cases, there is likewise no obligation to make a remark pursuant to Article 11 para. 3 BORA; see Article 8. (Setting of remarks).

However, 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, for example by a third party/trustor based on a trusteeship relationship). A review of this kind may, for example, be made by the shareholders confirming that there are no divergent ownership relationships, voting rights or rights of control and/or relevant trusteeships present.

If no report is made, based on an exemption from the reporting requirement, even though this no longer applies based on Article 6 BORA, because another natural person exercises direct or indirect control over management, there is a breach of duty under Article 15 BORA.

6 Preparation of compliance packages

6.1 General remarks

As from 10 November 2020, the documents required for identification and verification of beneficial owners may be submitted to the Register on a voluntary basis and viewed and used by obliged entities in complying with their due diligence obligations (compliance package).

Pursuant to Article 5a para. 1 BORA, all information, data and documents required for determination and verification of the identity of the beneficial owners may be submitted to the Register Authority electronically by a professional party representative via the *Unternehmensserviceportal* if such party representative has determined and verified the beneficial owners of the legal entity in accordance with the requirements of BORA. The compliance package is valid for a period of twelve months after the last report was submitted comprising a compliance package.

In addition to the submission of a report with a compliance package, a supplemental report may also be made to an existing compliance package. A supplemental report may be used to make the following changes to an existing compliance package:

- change of e-mail address for queries regarding the report or a compliance package;
- restriction or removal of a restriction regarding a compliance package, as well as change of the obliged entities who shall in any case be given access to the compliance package, and change of e-mail addresses for transmission of queries for approvals;
- change of organisation chart;
- addition or removal of submitted documents of the legal entity or change of data stored regarding those documents;
- addition or removal of relevant domestic and foreign parent entities or change to the data stored about them; and
- addition or removal of references to compliance packages of superordinate legal entities.

In the case of a supplemental report to an existing compliance package, compliance with the six-week deadline for proof of existence and ownership of foreign relevant superordinate legal entities will only be verified with regard to the newly added proof (as to justified exceptional cases with regard to the six-week deadline, see Article 6.2 (Documentary requirements)). A supplemental report to an existing compliance package shall not give rise to an extension of its period of validity.

6.2 Documentary requirements

The requirements in terms of information, data and documents that are to be submitted to the Register Authority as part of the compliance package are presented below. Documents submitted to the Register must always be up to date in accordance with Article 5a para. 4 BORA. This must, in particular, also be observed in the case of documents relating to domestic levels of legal entities, for which there is in principle no requirement to the effect that they may not be older than six weeks at the time of the report. The assessment of whether a document is up to date is the responsibility of the professional party representative submitting the compliance package to the Register. If the party representative is not aware of any circumstances to the contrary, he or she may assume that

they are up to date if the legal entity confirms this in accordance with Article 5a para. 5 BORA.

Excerpts from foreign commercial, company or trust registers may only be submitted to the Register pursuant to Article 5a para. 4 BORA if they are not more than six weeks old at the time of the report. The relevant date is the date on which the excerpt was created.

In justified exceptional cases, excerpts from foreign commercial, company or trust registers that are more than six weeks old may also be used if this is necessary due to the factual circumstances (e.g. due to the length of time required for postal delivery or because the party representative was only provided with the additionally required documents by the legal entity upon request; due to the necessity of obtaining translations or certifications). In any event, the party representative must also take account of the fact that the documents are probative, on the basis of which it is possible to determine and verify the identity and ownership and control structure of the legal entities in question.

However, a justified exception cannot be deemed given in the case of excerpts which can be obtained easily (in terms of the organisational effort or expense associated with procuring them) and which do not have to be translated, as will ordinarily be the case with excerpts in German or English from publicly accessible registers.

If individual documents are submitted as part of a supplemental report (Article 5a para. 8 BORA), this will not affect the original up-to-dateness of the documents submitted/stored previously.

Pursuant to Article 5a para. 5 BORA, confirmation from the management of the legal entity must be obtained in any case prior to submitting the report or supplemental report; however, this confirmation is not submitted to the Register. Prior to submitting the BORA report, the report from the legal entity's management under Article 5a para. 5 BORA may be prepared following entry of all of the data and importing the documents into the reporting form as an instruction for filing a report in the Beneficial Owners Register, and thus may be obtained before the notification is submitted.

On the "Compliance package" page of the reporting form "BORA – Report by party representatives" a total of four categories are provided for uploading the information, data and documents to be submitted, specifically the information on equity structure (organisation chart), documents on the reportable legal entity, documents of relevant superordinate domestic levels as well as documents of relevant superordinate foreign levels. The information, data and documents to be submitted must be matched with the appropriate

document types using a drop-down list, which is described in greater detail in the sub-sections below.

It should be noted that there is no warning message shown on the compliance package reporting form if individual documents which are mandatory for certain legal entities under Article 5a BORA are not uploaded and submitted under the relevant document type. It is the responsibility of the reporting party representative to check the completeness of the compliance package against the statutory requirements.

6.2.1 General documentary requirements

Where the documents in question are certificates (*Urkunden*), pursuant to Article 5a para. 2 BORA they must be probative certificates which are available in accordance with the legal standard customary in the country where the legal entity's registered office is located.

Documents may be submitted to the professional party representative in the original, as copies or in electronic form provided that the documents are probative certificates available in accordance with the typical national legal standard that applies at the place of incorporation of the legal entity. A document which has been submitted electronically will only constitute an original where an electronic signature is present. Pursuant to Article 5a para. 2 BORA, a copy will in any event not be deemed sufficient if

- the registered office of the relevant superordinate foreign legal entity is in a third country identified as a high-risk country at the time the compliance package was submitted (Article 2 no. 16 FM-GwG) or
- there are doubts regarding the authenticity of the certificate.

In both of these cases, the certificates in question must be submitted to the professional party representative in the original or in the form of a certified copy. If, for example, one of multiple superordinate legal entities has its registered office in a high-risk third country, then this requirement will only apply to certificates relating to that superordinate legal entity. For the remaining certificates contained in the compliance package, this requirement will only apply if there are doubts regarding their authenticity.

After the check by the party representative, copies of the submitted original documents shall be made, marked "Original submitted on:" noting the date and containing a reference to a clearly identifiable author of the remark and submitted to the Registry.

A certified copy is a confirmation by a person authorised to authenticate documents (e.g. a notary), a court or an issuing authority that the copy of the document corresponds to the

original. Certification of the authenticity of the signature increases the document's probative value.

Authentications of public documents in international transactions must, as a general principle, take the form of legalisation (diplomatic authentication). This requires an intermediate certification by the foreign ministry of the respective third country and certification by the authorised consular office of the Austrian embassy of the country from which the document originates.

In the case of States that have signed the Hague Apostille Convention, the apostille takes the place of legalisation. This is also a confirmation of authenticity, but is issued by a designated authority of the State by which the document was issued and does not require any further confirmation (with respect to the competent authorities in each case, see BGBl. No. 27/1968, most recently amended by BGBl III No. 168/2016; for more information on legalisation or apostilles, see the website of the Austrian Foreign Ministry).

If documents are not in German or English, then – irrespective of whether the registered office of the relevant superordinate foreign legal entity is located in a high-risk third country at the time of submission of the compliance package or whether there are doubts regarding the authenticity of the document in question – a certified translation of the document or, in any case, of the relevant portions in German or English must be submitted to the Register together with the compliance package in addition to the (certified) copy. In the case of a certified translation, the translator must confirm his or her translation based on the original and warrant its accuracy and completeness by means of a certification formula, a stamp and his or her signature.

Legalisation is also the certification of the translator's signature after the translation has been completed and confirmed by the translator. This increases the probative value of the certification of the translation, but is not required.

6.2.2 Organisation chart

Pursuant to Article 5a para. 1 no. 1 BORA, an organisation chart must be submitted showing the relevant ownership and control structure for general partnerships, limited partnerships, stock companies, limited liability companies, European companies (SE) and European economic interest groups. For this purpose, it is not necessary that the organisation chart be specifically prepared for the reportable legal entity. It is sufficient if the organisation chart shows the equity structures and voting rights, control or fiduciary relationships relevant to beneficial ownership. In any event, equity holdings, voting rights or fiduciary relationships

with more than 25% (first level of equity holding) or more than 50% (second level of equity holding) or control relationships will be considered relevant. Below these thresholds, equity holdings, voting rights or control relationships (e.g. trusteeship relationships) will be deemed relevant if they are necessary for the reportable entity to be able to assess the requirement to aggregate them.

There are no special requirements regarding the design or layout of the organisation chart. If the relevant ownership and control structure is already apparent from the extended excerpt, then a copy of the excerpt showing the relevant equity structure will also suffice.

Since, pursuant to Article 5a para. 5 BORA, the professional party representative must obtain a confirmation of the legal entity's management with an authorised company signature, it is not necessary for the company signature to appear on the organisation chart.

An organisation chart must also be submitted when filing a secondary report pursuant to Article 5 BORA and a secondary report with automatic data importing under Article 5 para. 5 BORA. In this case, the equity structures and voting rights, control or trusteeship relationships must be included to the extent that they are relevant to an assessment of whether the requirements for a secondary report pursuant to Article 2 no. 1 lit. b BORA are present.

In cases in which the submission of an organisation chart is not mandatory, there will be no objections to voluntary submission of an organisation chart if this is helpful in determining and verifying beneficial ownership.

In the reporting form for the compliance package, the organisation chart should be uploaded in the section "Information on equity structure". For legal entities pursuant to Article 1 para. 2 nos. 1 to 4, 9 and 10 BORA, this is a mandatory field.

6.2.3 Requirements applicable to certain legal entities

6.2.3.1 Partnerships

General partnerships (OG) and limited partnerships (KG) are partnerships established under Articles 105 et seqq. of the Austrian Business Enterprise Code (*Unternehmensgesetzbuch,* UGB), which are entered in the publicly accessible Commercial Register and which have legal capacity. They are thus capable of being vested with rights and obligations, of entering into liabilities and may also sue and be sued.

A registered partnership consists of at least two partners who, in the case of an OG, have personal, unlimited and joint liability. In the case of a KG, at least one partner has unlimited liability (general partner) whereas the liability of at least one other partner is limited to his liability amount (limited partner) in accordance with Article 171 UGB.

Since, in the case of partnerships, the equity ratios of the partners are not entered on the Commercial Register, pursuant to Article 5a para. 1 no. 2 lit. a BORA, in the case of partnerships the partnership agreement/deed of establishment should be submitted in the first instance as proof of the respective equity ratios.

In the case of an oral partnership agreement, a written declaration by all of the partners on the contents of that agreement in respect of beneficial ownership should be transmitted. The relevant content should in any case include the equity ratios, voting rights as well as other control relationships. The declaration should be signed by all of the partners.

If the oral or written partnership agreement or deed of establishment does not contain a provision on equity ratios, then other proof of the equity structure must be submitted. Suitable options in this case include, for example, a declaration signed by all of the partners or a declaration of the partnership signed on behalf of the partnership indicating the equity structure or the application of Article 109 para. 1, second sentence, UGB.

Partnership agreements or deed of establishments for partnerships should be uploaded in the compliance package reporting form under document types "Articles of Association" or "Deed of establishments", which are specifically provided for this purpose. For written declarations by the partners in the case of an oral partnership agreement, the document type "Other document" must be used. In those cases where the partnership agreement or the deed of establishment does not contain any provisions on equity ratios, then the separately procured proof about the ownership structures (see above) should be submitted under the document type "Proof about the ownership structures". In the field "Description of the document" additional notes or more detailed information on the document submitted can be provided.

6.2.3.2 Stock companies and European companies

Pursuant to the Stock Corporation Act, a stock corporation (AG) is a legal entity which is itself vested with rights and obligations. It is a corporation with minimum share capital of EUR 70,000, which is divided into shares.

Pursuant to Article 9 AktG, an AG whose shares are not publicly quoted or traded via multilateral trading facility (MTF) may only issue registered shares and must keep a share register (Article 61 AktG).

Publicly quoted AGs and companies whose shares are traded via a multilateral trading facility (MTF) may also issue bearer shares in accordance with Article 10 AktG. However, all bearer shares must also be documented in a global certificate and deposited with a securities clearing and deposit bank (central depository).

The European Company (SE) is a special form of stock company whose internal organisation may be dualistic (management board and supervisory board) or monistic (board of directors) in accordance with Article 34 of the SE Act. In the case of an SE, there are special formation requirements, since an SE may only be formed through a cross-border combination of an AG or SE by way of merger, formation of a holding SE or corporate conversion.

Pursuant to Article 5a para. 1 no. 2 lit. b BORA, in the case of AGs and SEs, proof must be submitted of the stock rights and shares relevant to beneficial ownership as well as the articles of association, where deviating voting rights or control relationships arise from them.

Proof of the stock rights and shares relevant to beneficial ownership can be provided, in particular, by submitting the following documents:

In the case of publicly quoted stock companies:

- A printout (screenshot) of the stock exchange information from an international information service provider such as Bloomberg, Thomson Reuters, SIX Financial Information, Fact-Set Research Systems, Morningstar or the like

For non-publicly quoted stock companies:

- Excerpt from the share register, signed on behalf of the company or
- a notarial record of the last shareholders' meeting, provided that it is up to date and shows all of the relevant shareholders, or a notarial confirmation of the relevant shareholders;

  In the case of non-publicly quoted stock companies with bearer shares:
- Confirmation of deposit pursuant to Article 1 para. 3 of the Depository Act by the securities clearing and depositary bank at which the bearer shares or corresponding global certificates pursuant to Article 10a AktG are deposited on behalf of the shareholder. The document must show for whom the bearer shares (in terms of type and quantity, units or percentage) are held in custody.

The above-referenced proofs of share rights and shares of stock companies and European Companies (SEs) that are relevant to beneficial ownership must be uploaded in the compliance package reporting form under the document type "Proof of the stock rights and shares". In cases where the company's articles of association are also being submitted, they must be submitted under the document type "Charter". In the field "Description of the document", additional notes or more detailed information on the document submitted can be provided.

6.2.3.3 Limited liability companies

Under the Private Limited Companies Act (*GmbH-Gesetz,* GmbHG), a private limited company (GmbH) is a legal entity that is itself vested with rights and obligations. It is a stock company with minimum share capital of EUR 35,000, at least half of which (EUR 17,500) must be paid up in cash at the time of formation. The shareholding structure is shown on the Austrian Commercial Register.

Limited liability companies to be newly formed may make use of the formation privilege under Article 10b GmbHG; in addition to the share capital which, in the case of a GmbH with the formation privilege, must nominally total at least EUR 35,000, formation-privileged capital contributions of at least EUR 10,000 must also be specified; at least half of this amount (EUR 5,000) must be paid up immediately in cash. For the duration of the formation privilege, which may be up to a maximum of ten years, the liability of the shareholders is limited to the amount of the formation-privileged capital contribution; this also applies in the event that insolvency proceedings are instituted during this period. After ten years, at the latest, at least half of the regular share capital (EUR 17,500) must then be paid in.

In the case of a GmbH, it is not necessary to submit articles of association if the articles of association do not indicate any voting rights or equity structures that deviate from the shareholding relationships entered on the Commercial Register. One should determine whether this requirement applies by reviewing the articles of association or by obtaining corresponding management confirmations signed on behalf of the company (see Article 6.3 (Documents relating to superordinate Austrian legal entities)).

If there are deviating voting rights or control relationships, then the articles of association must be submitted in accordance with Article 5a para. 1 no. 2 lit. c BORA. In such cases, the articles of association must be submitted in the compliance package reporting form under document type "Articles of Association".

6.2.3.4 Private foundations pursuant to Article 1 PSG

Pursuant to the Private Foundations Act (*Privatstiftungsgesetz*, PSG), a private foundation is a legal entity which is itself vested with rights and obligations. The founder dedicates assets to the private foundation which are intended for serving a permitted purpose which the founder has specified. The private foundation does not have any legal owners and is thus a 'foundation' within the meaning of Article 3 (6) (c) of Directive (EU) 2015/849 or pursuant to Article 2 para. 3 lit. a BORA. A private foundation may be formed by one or more founders by notarial deed; assets of at least EUR 70,000 must be contributed to the foundation in cash or in kind.

Pursuant to Article 5a para. 1 no. 2 lit. d BORA, the following documents must be submitted in the case of private foundations:

- Deed of foundation;
- Supplementary foundation deed(if any);
- All further proofs necessary for determining and verifying all of the beneficiaries of the private foundation under BORA (e.g. resolution of the foundation board or of another constitutive foundation body, if beneficiaries or one-time beneficiaries are specified by such resolution).

Where there are legitimate reasons which militate against forwarding one of the documents referred to above the Register, pursuant to Article 5a para. 3 BORA it shall be possible to forward a complete file note to the Register in lieu of submitting the document (see Article 6.5 (File notes)).

For private foundations the compliance package reporting form specifically provides for the two document types "Foundation deed" and "Supplemental foundation deed" for transmission of the relevant documents. For all other proofs required for identification and verification of all of the beneficiaries of the private foundation, the document type "Other proof of beneficiaries" must be selected. The specific document in question (e.g. resolution of foundation board on designation of beneficiaries) must be indicated in the test field "Description of the document" in the form of a brief comment.

6.2.3.5 Foundations and funds pursuant to Article 1 of the Federal Act on Foundations and Funds 2015 (*Bundes-Stiftungs- und Fondsgesetz*, BStFG) and foundations and funds based on provincial law

Charitable foundations and funds are legal entities established under Article 1 para. 1 of the Federal Act on Foundations and Funds 2015 – BStFG 2015 - or pursuant to the respective provincial laws.

Pursuant to Article 2 para. 1 BStFG 2015, charitable foundations are assets with legal personality that have been permanently dedicated by order of the founder and whose income serves the fulfilment of charitable or benevolent purposes.

Pursuant to Article 2 para. 3 BStFG 2015, charitable funds are assets with legal personality that are dedicated by an order of the founder on a non-permanent basis, serving fulfilment of charitable or benevolent purposes.

All charitable provincial foundations and funds are recorded on provincial registers, whereas Federal foundations and funds are recorded in the Federal Foundation and Fund Register. The Federal Foundation and Fund Register is open to public inspection, whereas the provincial registers are largely open to public inspection. In addition, all charitable foundations and funds are entered on a supplementary register for other affected persons/entities and are thus clearly identifiable by means of the serial number of the supplementary register. Excerpts from the Beneficial Owners Register may also be retrieved using this serial number.

Pursuant to Article 5a para. 1 no. 2 lit. e BORA, the following documents must be submitted in the case of the above-referenced foundations and funds:

- Deed of Foundation,
- Declaration of Formation or
- comparable proof (other deed of establishments, excerpts from the Register).

For deeds of foundation and declarations of formation, for transmitting these document types, the compliance package reporting form lists these by name. Comparable proof should be submitted using the document type "other document" with a brief comment in the text field "Description of the document" indicating the specific document in question (e.g. excerpt from a Register).

6.2.3.6 Trusts und arrangements of a similar nature to trusts

A trust is created when a natural person or legal entity (the settlor) transfers an asset, an item of property or a right (the trust assets) to a second person (the trustee), who manages or uses the transferred assets in future for one or more third parties (the beneficiary/beneficiaries) according to the rules established by the settlor and applicable to all persons.

Trusts do not (normally) have legal personality of their own; only the trustee has the right to act as the owner of the trust assets. Any asset is suitable as the subject matter of a trust, provided that ownership with respect to it is possible and that it can be transferred by a legal transaction.

Pursuant to Article 5a para. 1 no. 2 lit. f BORA, the following documents must be submitted in the case of trusts and arrangements of a similar nature to trusts:

- Trust deed ("trust deed"),
- other documents from which the beneficiaries of the trust can be identified (e.g. "side letters")
- all other proofs necessary to determine and verify all of the beneficiaries of the trust or of the arrangement of a similar nature to a trust.

If there are legitimate reasons militating against transmitting one of the above-referenced documents to the Register, then pursuant to Article 5a para. 3 BORA, instead of transmitting that document, a complete file note may be transmitted to the Register (see Article 6.3). For trusts and arrangements of a similar nature to trusts, the compliance package reporting form specifically provides for the document types "Trust deed" and "Trust deed sideletter" for transmitting the relevant documents. For all other proofs required to determine and verify all of the beneficiaries of the trust or arrangement of a similar nature to a trust, the document type "Other proof of beneficiaries" must be selected. The specific document in question must be indicated in the text field "Description of the document" in the form of a brief comment.

6.2.4 Legal entities not specifically referred to in Article 5a para. 1 no. 2 BORA

For all legal entities not expressly referred to in Article 5a para. 1 no. 2 BORA – except in the cases described in Articles 6.2.5 (Trusteeships) and 6.2.6 (Other proof and documents), no documents are to be submitted as a general rule. This thus applies to the following legal entities:

- **Commercial and industrial cooperative societies:** In accordance with the Cooperative Societies Act (*Genossenschaftsgesetz,* GenG), a commercial and industrial cooperative society is a legal entity that itself is vested with rights and obligations. It is an association of persons with legal personality, with an unlimited number of members, which essentially serves to promote the trade or business of its members, such as credit, procurement, sales, consumption, utilisation, construction, housing and settlement cooperatives. The equity capital of commercial and industrial cooperative societies is raised by its members by paying in the amount referenced in their holding.
- **Mutual insurance associations:** A mutual insurance association is an association established under the Insurance Supervision Act 2016 (*Versicherungsaufsichtsgesetz 2016,* VAG 2016) to provide insurance to its members on a mutual basis. A mutual insurance association requires a licence from the FMA in order to commence business operations in Austria. The name of the association must state that the insurance is operated on a mutual basis. The charter of the mutual insurance association must be set out in the form of a notarial deed. Mutual insurance associations must be entered in the Commercial Register.
- **Small insurance associations:** These are mutual insurance associations with registered office in Austria which meet the requirements under Article 68 para. 1 or para. 1a VAG 2016, which have as their object the operation of contractual insurance and have been granted a licence only within the territory of Austria.
- **Savings banks:** Savings banks are legal entities under private law established by municipalities or savings bank associations pursuant to the Savings Bank Act (*Sparkassengesetz,* SpG). They are credit institutions pursuant to licence granted under the provisions of the Banking Act (*Bankwesengesetz*, BWG). Savings banks are enterprises by virtue of their legal form pursuant to Article 2 UGB and must be entered in the Commercial Register.
- **European Cooperative Societies:** The European Cooperative Society (SCE) is a special form of commercial and industrial cooperative society. It is a legal form with legal personality, whose share capital is divided into units; the number of members and the formation capital are variable. Its purpose is to meet the needs of its members and/or to promote their business and/or social activities; this may, in particular, be done by concluding agreements with the members for the supply of goods or provision of services or the performance of work within the scope of the activities which the European Cooperative Society undertakes or commissions. Its

internal organisation may be dualistic (executive board and supervisory board) or monistic (board of directors) in accordance with Article 22 et seqq. of the SCE Act. In the case of a European cooperative society, there are special requirements applicable to its formation, since they may only be formed through a cross-border combination of cooperatives or European cooperatives by way of merger or corporate conversion.

- **Associations pursuant to Article 1 of the Associations Act:** Pursuant to Article 1 of the Associations Act (*Vereinsgesetz,* VerG), an association is a voluntary permanent association of at least two persons organised on the basis of a charter in order to pursue a specific, common, non-commercial purpose. The association has legal personality (Article 2 para. 1). The association's assets may only be used in accordance with its objects. The members of an association do not necessarily have to contribute capital to it. The right to form an association is also constitutionally secured by Article 12 of the Basic Law of 1867. Every association is registered in the Central Register of Associations and its data may be viewed publicly.
- **Legal entities pursuant to Article 1 para. 2 no. 13 BORA:** All other legal entities whose entry on the Commercial Register pursuant to Article 2 no. 13 FBG is provided for by law. As a rule, these are legal entities under public law whose entry on the Commercial Register is provided for by the law which contains their organisational legislation.

6.2.5 Trusteeships

A trusteeship is characterised by the fact that a settlor transfers to a trustee the full rights of control and management or an individual subset of the rights of control and management, on the basis of a contractual relationship concluded between them. The trustee can effectively dispose of the trust property *vis-à-vis* third parties, but in internal relations, he bears a duty to the settlor to exercise the rights transferred to him in a specific manner.

Pursuant to Article 2 no. 1 lit. a BORA, a trust relationship by the settlor establishes control making the settlor the beneficial owner of the legal entity if there are underlying relevant equity structures.

Pursuant to Article 5a para. 1 no. 2 lit. g BORA, in the case of relevant trusteeships, proofs and declarations must be submitted. Relevant trusteeships are those on the basis of which a natural person becomes the beneficial owner of the reportable entity, even if they merely establish control between legal entities in a chain of ownership. Proofs/declarations include, in particular, the trust agreement:

- this is usually combined with an offer of assignment from the trustee to the settlor and is drawn up in the form of a notarial deed
- otherwise, it may be concluded as a bilateral legal transaction in writing or orally. The default case is a written contract signed by both the settlor and the trustee.
- In the case of an oral trust agreement, the contents relevant to determining and verifying beneficial ownership should be recorded in a declaration signed by the trustee and the settlor. In the case of separate declarations by the trustee and the settlor, care should be taken to ensure that these correspond with each other and the legal position of the party in question can be derived from them.

In the compliance package reporting form, proof of relevant trusteeships must be uploaded either as a "Trusteeship" or as "Other proof of trusteeships". The latter type of document is used, in particular, to transmit unilateral declarations or confirmations from which the existence of a trusteeship can be inferred. The document in question must be specified in the text field "Description of the document" in the form of a brief comment.

6.2.6 Other proof and documents

Pursuant to Article 5a para. 1 no. 2 lit. h BORA, other proof and documents that are necessary for the determination and verification of the beneficial owners of the legal entity must be submitted to the Register Authority. This will, in particular, be the case if there are relevant voting rights differing from the respective equity ratio or shareholding or if there are other control relationships (which have not otherwise been identified) and which are relevant to determination and verification of the beneficial owners.

Such documents will, for example, include:

- Syndicate agreements
- Voting trust agreements
- Option agreements
- Binding assignment offers
- Assignment agreements

Other proof and documents should be uploaded as "Other document" in the compliance package reporting form. The specific document (e.g. syndicate agreement) must be specified in the text field "Description of the document" in the form of a brief comment.

6.3 Documents relating to superordinate Austrian legal entities

Pursuant to Article 5a para. 1 no. 3 BORA, the documents listed in Article 5a para. 1 no. 2 lits. a to h BORA must be submitted for relevant Austrian legal entities.

It follows from the obligation to take reasonable measures pursuant to Article 3 para. 1 BORA that, in order to understand the ownership and control structure, the entire ownership and control structure must be understood. This is the only way to ensure that all beneficial owners can be identified and that, if necessary, the equity ratios, voting rights or control can be aggregated. A distinction must be made between this and the obligation to transmit documents, which must only be performed if the respective Austrian superordinate legal entities are relevant as defined in Article 5a para. 1 no. 3 BORA.

Relevant superordinate Austrian legal entities are those legal entities which are decisive for identifying possible indirect beneficial owners of the reportable legal entity in a chain of participations under Article 2 no. 1 lit. a sublit. bb BORA and those which are necessary in order to be able to assess whether shares, voting rights or control relationships must be aggregated. Thus, superordinate legal entities may also be relevant if, due to the respective amount of the shareholding or other circumstances, it is likely that an aggregation of the shareholdings would be required.

In the case of secondary reports under Article 5 BORA and secondary reports with automatic data importing pursuant to Article 5 para. 5 BORA, at least such documents must be submitted which present the shareholding and control relationships in the reportable legal entity in such a way that the non-existence of beneficial owners can be conclusively established. With regard to the type of documents to be submitted, in addition to an organisation chart, the documents specified in Article 5a para. 1 no. 2 lits. a to h and no. 4 lits. a to e BORA must also be included in such cases.

In the case of voting rights or control relationships deviating from the equity structures, the required proof and documents pursuant to Article 5a para. 1 no. 2 BORA must be obtained at the relevant level of corporate structure. Whether the requirement to obtain such documents exists can be assessed on the basis of the following confirmations:

- Confirmation on behalf of the company signed by the management of the reportable legal entity (Article 5a para. 5 BORA) in the case of fact patterns within Austria, provided that the correctness of the declaration can be verified by obtaining extended, current BORA excerpts (not more than six weeks old) from the Austrian intermediate entities.

- Confirmation signed on behalf of the company by the management of the reportable entity (Article 5a para. 5 BORA) in the case of fact patterns situated in other Member States, provided the accuracy of the declaration can be verified by obtaining current excerpts (not more than six weeks old) from a register complying with the requirements of Articles 30 or 31 of Directive (EU) 2015/849.
- Confirmation signed on behalf of the company by the management of the reportable entity (Article 5a para. 5 BORA) and confirmation on behalf of the company signed by the management of the ultimate legal entity in the case of Austrian and foreign fact patterns, unless the registered office of the intermediate entity is located in a high-risk third country. If, however, the registered office of an intermediate legal entity is located in a high-risk third country, then a confirmation from management signed on behalf of the company must also be obtained from such intermediate legal entity.

The above-referenced confirmations should not be sent to the Register Authority, but rather should be retained by the party representative. A pre-populated template for confirmation by management of the reportable entity pursuant to Article 5a para. 5 BORA can be generated automatically as a PDF after entering all of the data into the reporting form. The data may still be changed as required, cannot be viewed by the Register Authority, and is only entered in the Register after it is sent.

If information or concrete indications exist (e.g. reference to the existence of a shareholders' agreement on the website of the group parent company; references on the website or in the annual report of a group company or in media reports to the existence of a block or pool of shareholders acting in a uniform manner, whose voting or control rights are, for example, shown as a total (total percentage) for a specific group of persons or for "XYZ family") to the effect that voting rights or control relationships exist that deviate from the established equity structures, then the required proof and documents pursuant to Article 5a para. 1 no. 2 BORA must be procured and verified in any event.

If it is determined that no deviation from the presentation of the relevant equity structure is present, then in the case of a GmbH at an intermediate level it will not normally be necessary to submit any documents. By contrast, in the case of an OG, a KG, an EWIV, an AG and an SE, documents will always be required, since in these cases the equity structure is not entered in the Commercial Register.

If, in respect of a superordinate legal entity pursuant to Article 5a para. 1 no. 3 with registered office in Austria, a valid compliance package is stored in the register at the time of reporting, the reporting legal entity is not required to transmit documents for such legal

entity if a reference is made to the identification number for said legal entity and of the fact that the compliance package is being referred to. Responsibility for the content of the forwarded compliance package is borne by the legal entity to the compliance package refers. This shall be without prejudice to the requirement to transmit those documents that relate to the reportable entity itself or the levels of participation lying between the reportable entity and the Austrian entity to which the reference was made.

However, reference to a compliance package of a superordinate legal entity shall not take the place of verification of the beneficial owner of the reportable entity by the party representative. In connection with verification of the identity of the beneficial owner pursuant to Article 11 para. 2a BORA, generally, the documents and proof contained in a complete and valid compliance package may be relied upon.

With regard to the types of document to be used for documents of superordinate Austrian legal entities in the compliance package reporting form, reference is made to the statements regarding the individual forms of legal entities in Article 6.2 (Documentary requirements).

6.4 Documents relating to superordinate foreign legal entities

For foreign superordinate legal entities relevant to the beneficial ownership of the legal entity, the identification number as well as the legal form and country of domicile must be indicated in the report. As to relevance, see Article 6.3 (Documents relating to superordinate Austrian legal entities).

By way of a **first step**, it should be determined whether a foreign legal entity is a company (Article 3 (6) (a) of the 5th Money Laundering Directive), a trust (Article 3 (6) (b) of the 5th Money Laundering Directive), a foundation or an arrangement in the nature of a trust (Article 3 (6) (c) of the 5th Money Laundering Directive), since determination of the beneficial owners and the required documents will depend on this. When determining the category from amongst the four categories in which the specific form of legal entity should be classified, with entities from EEA Member States, the assessment of the relevant Member State may be relied upon in connection with the respective implementation of the 5th Money Laundering Directive. In the case of third countries, the assessment of the form of legal entity should be carried out by the party representatives themselves. The list of companies published on the website of the Federal Ministry of Finance provides assistance for this purpose (see Article 6.4.6 (Legal form-specific proof and country-specific information.))

By way of a **second step**, the documents required under Article 5a para. 1 no. 4 BORA should be obtained. Since the existence of the foreign legal entity cannot be proven on the

basis of an extended excerpt, this must also be proven using appropriate documents. Thus, the following proofs, available from the registered office of the superordinate legal entity in accordance with the customary national legal standard, shall be submitted to the Register Authority:

- proof provided for the purpose of verifying the existence of a legal entity in the country of domicile (e.g. publicly available register excerpts, current formation agreements etc.);
- proof intended for purposes of verifying ownership in the country of domicile
- partnership agreements, articles of association and the like, insofar as voting rights or control relationships differ from the ownership structures;
- proofs and declarations which reveal any relevant trusteeships relevant to the status of the beneficial owner under this Federal Act and which are necessary for determining and verifying such beneficial owners;
- other proofs and documents necessary for determining and verifying the beneficial owners of the legal entity.

In the compliance package reporting form, before uploading any of these proofs for a foreign legal entity, the type of document submitted in each case must be selected using a dropdown list. Depending on whether the foreign legal entity is a company, a foundation, a trust or an arrangement in the nature of a trust, different types of document can be selected, which are essentially based on the class of proof to be provided as per Article 5a para. 1 no. 4 lits. a-e BORA. Which of the document types is provided for the respective proof is thus set out in the sub-sections on corresponding proofs shown below.

It should be noted that under no circumstances should individual documents be uploaded to the compliance package more than once. For example, if a document represents both proof of existence and proof of control relationships, it must be submitted only once under the document type "Proof of existence". In the field "Description of the document" a corresponding reference should be made to the additional document type or the additional purpose of the document in question.

However, several different documents of the same document type may be submitted.

If a valid compliance package has been stored for a legal entity located within Austria **which is at the final domestic level of a chain of ownership or control**, the obligation to transmit the documents for those relevant legal entities domiciled abroad whose documents are already included in such compliance package will not apply if the identification number

for that legal entity and a reference to the compliance package are stated. However, the reference to such compliance package is not a substitute for verification of the beneficial owners of the reporting entity by the party representatives, although in principle, the documents and proofs contained in a complete and valid compliance package may be relied upon in connection with such verification. Please refer to Article 6.3 (Documents relating to superordinate Austrian legal entities).

If there are multiple legal entities at the final Austrian level of a chain of ownership or control, then a compliance package would need to be created for at least one of such legal entities if a compliance package is to be created for subordinate Austrian legal entities based on reference to the final Austrian level of a chain of ownership or control. For Austrian subordinate legal entities, the obligation to transmit the documents for those relevant legal entities domiciled abroad whose documents are included in the referenced compliance packages will not apply in this case. If several legal entities exist in parallel at the final Austrian level of a chain of ownership or control, in respect of which the same foreign legal entities are superordinate, then a reference to the compliance package for one of those legal entities will suffice. With regard to the compliance packages for parallel legal entities at the final Austrian level, it will likewise suffice if a valid compliance package is stored for one of these legal entities which contains the documents for the relevant legal entities domiciled abroad, and the other parallel legal entities at the last Austrian level of the chain of ownership or control refer to that compliance package.

6.4.1 Suitable proof for verifying existence

Pursuant to Article 5a para. 1 no. 4 lit. a BORA, for the respective foreign superordinate legal entity, such proof as is customary and is intended to verify the existence of the relevant legal entity in the country of domicile must be submitted. In this context, the evidentiary documents required for verifying the identity of legal entities must comply with the legal standards customary in the respective country. It will thus be necessary for the party representatives to regularly check as to which documents are customarily used or available in the country in question to prove the existence of the legal entity.

First and foremost, excerpts from publicly accessible registers comparable to the Austrian Commercial Register or Beneficial Owners Register should be used. In particular, in order to prove the existence of foreign legal entities domiciled in an EU Member State or a third country in which requirements equivalent to those of the 5th Money Laundering Directive apply, the submission of a customary national register excerpt from a register established in accordance with the law in question may be considered under Article 30 or 31 of the 5th

Money Laundering Directive. It should be noted at this point that excerpts from foreign commercial registers, company registers or trust registers may not, pursuant to Article 5a para. 4 BORA, be more than 6 weeks old in the case of reports and change reports.

As an alternative, the identity of the foreign legal entity should be verified on the basis of other documents originating from a credible and independent body. The documents used as an alternative should in any event demonstrate, on an overall view, the legal existence, the company name (or name used in legal transactions), the legal form, the country of domicile of the legal entity and, if applicable, the powers of representation, in so far as this is necessary in order to determine and verify beneficial ownership. In particular, current deed of establishments as well as confirmations issued by public bodies or authorities (e.g. "Certificate of Good Standing") may be considered. Other possible proof may, for example, include state concessions, confirmations of chamber of commerce memberships, minutes of general meetings or excerpts from databases recognised in general legal transactions (e.g. Bureau van Dijk). For such documents used on an alternative basis, the rule likewise applies that they must not be more than 6 weeks old in the case of reports and change reports.

Proof of existence must be uploaded to the relevant foreign legal entity under the document type "Proof of existence" in the compliance package reporting form. The document in question (excerpt from the register, Certificate of Good Standing) must be specified in the "Description of the document" field in the form of a brief comment.

6.4.2 Suitable proof for verifying ownership

Article 5a para. 1 no. 4 lit. b BORA provides that foreign superordinate legal entities must submit such proof as is customary within their country and as provided for purposes of verifying ownership in the country of domicile.

In particular, publicly accessible register excerpts – similar to the Austrian Commercial Register – may be used as sources of information if they contain information on the legal entity's equity structure in addition to the entity's master data. In this context, further proof may also be provided by submitting separately retrievable documents on ownership structures which have been submitted to the respective Register Authority (e.g. list of shareholders as an annex to the German Commercial Register).

It should be noted that the beneficial owners registers established in EU Member States on the basis of EU requirements will not generally contain complete information on the direct equity holdings of the registered legal entity, which is why in such case they should not be

regarded as suitable proof of ownership structure within the meaning of Article 5a para. 1 no. 4 lit. b BORA.

Depending on the legal form of the legal entity in question, non-public documents (e.g. articles of association or similar deed of establishments) may have to be used to determine ownership structure. For stock companies, in particular, excerpts from the share register signed on behalf of the company or a printout (dated internet screenshot of ownership structure of the AG) from an international stock market exchange service provider may be a suitable source of information. For a list containing examples of such information service providers, see 6.2.3.2 (Stock companies and European companies). In the Anglo-American legal sphere, so-called share or stock certificates are often also considered as proof of share rights in a company.

Depending on the legal form, other objective sources of information available in line with customary national legal standards may be used as secondary proof of ownership structure; the reliability and probative value of such proof must be examined on a case-by-case basis.

Proof for purposes of verifying ownership must be uploaded to the compliance package reporting form under the document type "Proof of ownership". For documents serving both as proof of existence and ownership, the combined document type "Proof of existence and ownership" is provided. The specific document (e.g. excerpt from the register, share certificate, etc.) must be specified in the text field "Description of the document" in the form of a brief comment.

6.4.3 Proof of deviating voting rights or control

Pursuant to Article 5a para. 1 no. 4 lit. c BORA, partnership agreements, articles of association and the like must be submitted for foreign superordinate legal entities if these indicate voting rights or control relationships deviating from the ownership structure which are required to be disclosed under Article 5a para. 1 no. 4 lit. b BORA. The question of whether there is a requirement to obtain these documents for superordinate foreign entities may be determined by reference to the list set out in Article 6.3 (Documents relating to superordinate Austrian legal entities) on the basis of the measures and criteria set out therein.

Article 5a para. 1 no. 4 lit. c BORA also covers those documents which serve as proof of control relationships in the case of trusts, foundations, arrangements in the nature of a trust or other classic ownerless entities. The documents used in international legal transactions for such legal entities will essentially correspond to the documents listed in Article 6.2.3.4

(Private foundations pursuant to Article 1 PSG), 6.2.3.5 (Foundations and funds pursuant to Article 1 of the Federal Act on Foundations and Funds 2015 (*Bundes-Stiftungs- und Fondsgesetz*, BStFG) and foundations and funds based on provincial law) and 6.2.3.6 (Trusts und arrangements of a similar nature to trusts).

The document type under which the proof of deviating voting rights or control relationships should be submitted in the compliance package reporting form will primarily depend on the legal form of the foreign legal entity in question (company, trust, foundation or arrangement in the nature of a trust). For companies, the general document type "Proof of deviating voting rights or control relationships" is generally required here. The specific document (e.g. partnership agreement) must be indicated in the text field describing the document in the form of a brief comment.

In the case of trusts, foundations or arrangements in the nature of a trust, other types of documents are provided for proof of the control relationship. For example, for foundations, the document types "Deed of foundation" and "Supplemental deed of foundation/charter" can be selected which will usually indicate the founders and foundation board members (and usually the beneficiaries too). A catch-all category is also provided by the document type "Other proof of beneficiaries" under which, for example, resolutions of foundation bodies on the designation of beneficiaries can be uploaded. Corresponding document types can also be found in the case of trusts and arrangements in the nature of trusts; additional information specifying the document can be provided in each case in the text field describing the document.

In certain configurations, it is possible that a certain document will fall both under the document type "Exercise of deviating voting rights/control" and one of the three document types concerning proof of existence or ownership ("Proof of existence", "Proof of ownership" or "Proof of existence and ownership"). In such cases, the relevant document must be submitted under the document type relating to proof of existence or ownership, as proof to this effect must be submitted in any case. The existence of deviating voting rights or control should be indicated in the text field "Description of the document" in the form of a brief comment.

6.4.4 Proof of relevant trusteeships

Numerous jurisdictions have legal instruments comparable to the Austrian trusteeship. Pursuant to Article 5a para. 1 no. 4 lit. d BORA, all proofs and declarations indicating any trusteeships relevant to the status of beneficial owners and which are necessary for

determining and verifying such beneficial owners must, in principle, be submitted to the Register Authority, irrespective of the proof available on the basis of customary national legal standards. Thus, in principle, the same proof must also be used for trust structures established abroad as for Austrian trusts; the terms of Article 6.2.5 (Trusteeships) must be observed. As a rule, therefore, relevant trust agreements will have to be obtained and submitted in the form of a written contract or corresponding declarations by the settlor and trustee.

In the compliance package reporting form, proof of relevant trusteeships must be uploaded for the relevant legal entity either as a "Trusteeship" or as "Other proof of trusteeships". The latter type of document is used in particular for transmission of unilateral declarations or confirmations from which the existence of a trusteeship can be derived. The document in question must be specified in the text field "Description of the document" in the form of a brief comment.

6.4.5 Other proof and documents

Pursuant to Article 5a para. 1 no. 4 lit. e, other proof and documents required for determining and verifying beneficial owners of the legal entity must be submitted in any case if there are relevant voting rights which diverge from the respective equity or shareholding ratio or if there are other control relationships which are relevant to determining and verifying the beneficial owners, submission of which is not already required under Article 5a para. 1 no. 4 lits. a to d BORA. Such documents include, for example:

- syndicate agreements
- voting trust agreements
- option agreements
- binding assignment offers
- assignment agreements

Other proof and documents of foreign legal entities must be uploaded as "Other document" in the compliance package reporting form for the relevant legal entity. The specific document (e.g. syndicate agreement) must be indicated in the text field "Description of the document" in the form of a brief comment.

6.4.6 Legal form-specific proof and country-specific information

The question of what documents are required in each case may be assessed pursuant to Article 5a para. 1 no. 2 BORA if the form of the foreign legal entity is comparable to that of a specific Austrian legal entity. In addition, country-specific information and notes on the

country-specific proofs (in each case for specific, locally available types of legal entities) can be found on the website of the Federal Ministry of Finance and may in some cases be accessed via the websites of the beneficial owners register of the other Member States.

It should be noted that the country-specific information does not provide a complete overview of the legal system of the jurisdictions concerned, nor does it constitute a binding assessment by the Federal Ministry of Finance of foreign legal forms. The responsibility for assessing the required legal form-specific proofs and for determining and verifying beneficial owners lies with the legal entities/the parties bearing the respective legal due diligence obligations.

6.5 File notes

Pursuant to Article 5a para. 3 BORA, instead of transmitting documents, under certain circumstances it is permissible to transmit a complete file note. This option exists in principle with regard to all documents to be transmitted as part of the compliance package. One should assume here that documents are broadly defined, and include the documents mentioned in Article 5a para. 1 nos. 2 and 4 BORA. It follows from the protective purpose of Article 5a para. 4 BORA that, in the case of publicly accessible documents which are, for example, part of the collection of documents held at the Commercial Register, a file note will not be permissible, since in this case there are no justified grounds militating against submitting the publicly accessible documents.

The description of the relevant parts of the document required under Article 5a para. 3 no. 4 BORA will also require the professional party representative or authorised third party pursuant to Article 2 (1) (3) (a) and (b) of Directive (EU) 2015/849 to have inspected the document before redactions of any parts of its contents have been made.

The following persons are authorised to prepare file notes:

1) the professional party representative
2) a third party as defined in Article 2 (1) (3) (a) and (b) of Directive (EU) 2015/849, provided that such third party has its registered office in Austria, in another Member State or in a third country which is treated as equivalent pursuant to Article 13 para. 4 no. 1 and 2 FM-GwG. Third parties established in high-risk third countries (Article 2 no. 16 FM-GwG) are excluded from preparing and transmitting a file note. Third parties pursuant to Article 2 (1) (3) (a) and (b) of Directive (EU) 2015/849 are:

    a) auditors, external accountants and tax advisors;

b) notaries and other independent members of the legal professions.

A complete file note may only be transmitted in lieu of a document if there are legitimate reasons which militate against transmitting the document itself. Legitimate reasons will, in particular, be present if overriding legitimate interests on the part of the beneficial owner or other persons whose interests would or could be directly affected by full disclosure of the contents of the document (e.g. persons named in the document or directors or officers of the legal entities involved) would constitute obstacles to transmitting the document. It is irrelevant whether a compliance package is restricted or not.

Legitimate reasons with regard to the data subject may be assumed, for example, if

- facts justify the assumption that disclosure of the document would lead to a disproportionate risk of becoming a victim of the criminal offences specified in Article 10a para. 2 BORA. This in any event includes data of limited beneficial owners, but also of other persons referred to in the document
- the document contains business or trade secrets, or the document contains information which must be kept secret for reasons of competition law
- disclosure of the document would constitute a risk of significant pecuniary disadvantage to the legal entity or persons named therein
- a particularly high degree of confidentiality is inherent in the nature of the document, for reasons other than concealment of beneficial ownership, for example, in the case of supplemental deeds of foundation:
    - testamentary dispositions or other information are included which relate to the highly personal sphere of life of the persons referenced;
    - beneficiaries are named in a manner that would result in undue disclosure of income or assets;
    - information or instructions on financial matters (such as business or investment strategies) are included which, in terms of their objective need for protection, are equivalent to business or trade secrets.

It should be noted that only the transmission of **complete** file notes is possible. A complete file note must contain the following information:

1. date and place of inspection,
2. first name, surname, date of birth and signature of the person performing the inspection,

3. exact designation of the document inspected and by whom the document was prepared and signed and in what capacity,
4. a description of the contents of the document and a summary of all parts of the document relevant to beneficial ownership of a legal entity. There shall be no objection if, in lieu of this, a copy of the document is attached to the file note in which such passages have been redacted that are not relevant to determining and verifying beneficial ownership. In this case, care should be taken to ensure that no passages are redacted which contain KYC-relevant information in general and which could thus be relevant to the fulfilment of due diligence obligations by obliged entities under the respective substantive law (such as FM-GwG, RAO, NO, WTBG 2017, etc.) in order to ensure that the compliance package can be used for its intended purpose.

There shall be no objection if information beyond the contents referenced in items 1 to 4 is included in the file note if this serves the prevention of money laundering and financing of terrorism.

Pursuant to Article 5a para. 3 BORA, the transmission of file notes in lieu of documents is not permitted if the registered office of the issuer of the document, the registered office of one of the parties that originated the document, or the registered office of the legal entity to which the document relates is located in a high-risk third country (Article 2 no. 16 FM-GwG). In such cases, one must in any event proceed in accordance with Article 5a para. 2 BORA.

File notes may be transmitted with the compliance package reporting form directly next to the menu item for selection of the respective document type for the respective legal entity. A corresponding selection field (Yes/No) will, at this point, indicate the option of submitting a file note. The date of issue of the underlying original document must always be indicated as the date in the reporting form.

The legitimate reasons militating against transmission of the document and which are therefore a prerequisite for preparation of the file note do not need to be reported. The assessment of whether legitimate reasons exist is the responsibility of the professional party representative who transmits the compliance package to the registry. The absence of legitimate reasons will not per se cause the compliance package to be deemed incomplete if the file note otherwise complies with the requirements of Article 5a para. 3 BORA.

6.6 Notarial confirmations

Pursuant to Article 89b NO, notaries issue notarisations on facts contained, inter alia, in public or publicly certified documents. It follows from this that notaries are able to issue

confirmations of facts relevant to the beneficial owner of the legal entity after having inspected the required documents in each case. Such notarial confirmation has the same evidentiary value as the original document on the basis of which the confirmation was issued. Thus, for example, if a notary issues a confirmation of facts arising out of a public deed, then the corresponding confirmation is itself a public deed.

As a consequence, notarial confirmations within the meaning of Article 89b NO should be treated as documents pursuant to Article 5a para. 1 no. 2 / no. 3 BORA. Notarial confirmation of the facts relevant to beneficial ownership is thus a substitute for submission of the respective documents/deeds. In contrast to the complete file note under Article 5a para. 3 BORA, the existence of legitimate reasons is not a prerequisite for submission of the notarial confirmation. The notarial confirmation must state that the confirmation is being issued regarding all facts relevant to beneficial ownership contained in the deed.

An example of how this is applied arises for instance in the case of foundations, for which the contents of a supplementary foundation deedrelevant to beneficial ownership may be recorded in a notarial confirmation and transmitted instead of the original deed, as part of a compliance package to the Register Authority.

In the reporting form, the notarial confirmation should be submitted as an "Other document". The description of the document should be "Notarial confirmation of (description of document in question)".

7 Inspection of the Register

Obliged entities, competent authorities, natural persons and organisations with a verifiable legitimate interest may obtain excerpts from the Beneficial Owners Register. This is so that the primary purpose of the Register – to contribute toward preventing money laundering and terrorism financing – can be fulfilled. The excerpts were thereby 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.

7.1 Inspection by obliged entities

The question of which entities constitute obliged entities within the meaning of BORA is governed by Article 9 para. 1 BORA.

The Register shall be inspected by way of an excerpt bearing an official signature of the Register 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.*

7.1.1 Inspection in application of due diligence requirements to clients

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 clients.

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

The term "client" relates to the definition applicable to the obliged entity under relevant substantive laws (e.g. Article 2 no. 15 FM-GwG). However, the term "client" 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 client with whom there is a prospect of establishing a business relationship. It is not permissible if no contact has been made with the client. For example, it is not permissible to determine who the beneficial owners of a client are before contacting the client.

In addition, attorneys, notaries, external auditors, tax advisors, balance sheet accountants, accountants and payroll accountants (obliged entities pursuant to Article 9 para. 1 nos. 6 to 10 BORA) may also inspect the register on behalf of their clients and professional associations of auditors for purposes of advising their members with respect to identification, verification and reporting of beneficial owners of their clients or members and for purposes of advising beneficial owners in regard to the submission of applications under Article 10a and Article 14 para. 7 BORA.

The obliged entity shall conduct its inspection by retrieving an excerpt bearing an official signature of the Register 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 clients but must use a risk-based approach to meeting their due diligence requirements. Obliged entities who are subject to oversight by the FMA, may find the relevant measures in the appropriate FMA circulars.

7.1.2 Disclosure of excerpts from the Register

The restrictions on inspection of the Register include the restriction that simple and extended excerpts and the information contained therein 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 client (e.g. to verify with the client 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.

A disclosure going beyond this may give rise to a violation of supervisory rules or professional duties on the part of the obliged entities in question. The intentional disclosure of excerpts to third parties where these contain data records on which an information block or restriction on inspection pursuant to Article 10a BORA has been placed, constitutes a financial offence pursuant to Article 15 para. 6 BORA and is punishable by a fine of up to EUR 50,000.

7.2 Public inspection

With the implementation of the 5th Money Laundering Directive, the Beneficial Owners Register has been publicly accessible since 10 January 2020. Since that date, it has been possible to download public excerpts from the Register without having to give any further reasons for the request, in return for payment of a user fee. There are no restrictive access requirements for public inspection. Pursuant to Article 10 BORA, anyone may electronically retrieve a public excerpt from the Register bearing an official signature of the Register Authority.

Public access to the Register is available via the website of the Federal Ministry of Finance. A public excerpt contains the following information:

- the legal entity's identification number and identification register, name of the legal entity and address details
- the legal form and information about the period of time for which the legal entity has been in existence
- first name and surname, date of birth, nationality and country of residence of beneficial owners
- type and scope of beneficial ownership

Data on beneficial owners in respect of whom a restriction of inspection has been imposed or granted pursuant to Article 10a BORA (see *infra* Article 7.3 (Restriction of inspection)) are not viewable in public excerpts. Instead, these contain a reference to the restriction on inspection which has been applied.

7.3 Restriction of inspection

Pursuant to Article 10a para. 1 BORA, upon written application of a beneficial owner, the Register Authority must rule that data on such beneficial owner cannot be displayed in public, simple and extended excerpts from the Register if such beneficial owner furnishes proof that, in view of all of the circumstances of the individual case, the overriding legitimate interests of the beneficial owner outweigh the interests in inspection.

Pursuant to Article 10a para. 1 BORA, the application must be submitted in writing to the Register Authority directly by the beneficial owner or by a party representative engaged by the beneficial owner. If the person is the beneficial owner of several legal entities, then all of the legal entities for which a restriction on inspection is to be requested must be listed in the request. In addition to the name and date of birth of the person as to whom the restriction is to apply as well as the name and identification number of the legal entities in question, the application must also contain a statement of reasons evidencing that, if all of the circumstances of the individual case are taken into account, the inspection is contrary to the overriding legitimate interests of the beneficial owner. In the case of minors registered in Austria, only the name and date of birth are required. In the case of minors not registered in Austria, however, a copy of the birth certificate or other public document confirming the minor's age must be enclosed.

Overriding legitimate interests of the beneficial owner will be present if facts justify the assumption that inspection would expose the beneficial owner to the disproportionate risk of becoming a victim of one of the criminal offences listed in Article 10a para. 2 BORA. Furthermore, overriding legitimate interests of the beneficial owner will be present in any event if the beneficial owner is a minor or lacks legal capacity.

After filing of the application, the Register Authority shall within 14 days order a restriction on inspection, provided the application is not manifestly unfounded. Within twelve months from the date of receipt of the application, the Register Authority must settle the application by means of a ruling, taking full account of all circumstances of the individual case. Appeals against decisions of the Register Authority are adjudicated by the Federal Administrative Court.

The restriction on inspection is granted for a period of five years, and in the case of minors for a period to last until the minor reaches majority. Thereafter, a new application for restriction of inspection must be submitted. The application may be filed prior to the expiry date of the restriction.

7.4 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 and 7 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. 6 BORA and is punishable by a fine of up to EUR 50,000.

8 Setting of remarks

As of 10 January 2020, obliged entities are required to make a remark electronically via the *Unternehmensserviceportal* and provide the reasons for making such remarks in standardised format if

- in the course of their client due diligence procedures, they determine that with respect to a client who is an entity within the meaning of this Federal Act, the beneficial owners entered on the Register do not correspond to those ascertained by them in the course of their client due diligence procedures; and
- they believe that the data on beneficial owners entered on the Register are incorrect or incomplete.

The making of a remark must be done using the form "BORA – set remark", which may be accessed either via the file report function or via the menu item "Set remark" in the BORA Management System. If the form or the menu item is not visible, the administrator should be contacted to assign the appropriate rights.

Pursuant to Article 11 para. 3 BORA, the obligation to make a remark does not apply if the obliged entity notifies its customer of the incorrect or incomplete entry and if the customer makes a correction within a reasonable time. The length of the period to be regarded as reasonable should be assessed on the basis of the specific fact patterns:

- in the case of simple fact patterns with purely Austrian relevance, one week will be considered reasonable
- in the case of complex fact patterns which depend, for example, on the resolution of a difficult legal question or where documents have to be obtained from foreign superordinate legal entities, a longer period will be reasonable; however, four weeks should be regarded as the upper limit in any event in terms of the period for submitting reports once the change is known.

With regard to the question of whether the data on beneficial owners recorded on the Register is incorrect or incomplete, it should be noted that in the case of legal entities with secondary reporting using IT-supported data importing under Article 5 para. 5 BORA and in the case of legal entities exempt from reporting using IT-supported data importing pursuant to Article 6 BORA, only the fact of secondary determination or the existence of beneficial ownership by other beneficial owners not included in the excerpt must be reported. Since the aim of these provisions is to simplify administration, it is appropriate to apply a less strict standard when checking whether the registered data on beneficial owners is incorrect or incomplete. Thus, there is no duty to set a remark if

- all identified and verified beneficial owners appear in the excerpt and can be clearly identified, but individual personal data are incorrect or incomplete
- in the case of partnerships, beneficial owners are calculated in accordance with Article 109 para. 1, second sentence, UGB, but in fact different equity structures or voting rights actually exist on the basis of the partnership agreement, as long as this does not result in one or more additional beneficial owners.