

**NEW PROVISIONS REGARDING THE BENEFICIAL OWNER INTRODUCED
BY GOVERNMENT EMERGENCY ORDINANCE NO. 111/2020.
CLARIFICATIONS AND NEW UNCERTAINTIES**

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The Government Emergency Ordinance no. 111/2020 which amends Law no. 129/2019 on preventing and fighting money laundering and the financing of terrorism was published in the Official Gazette of Romania and entered into force on 15 July 2020 (hereinafter referred to as “**GEO 111/2020**”). GEO 111/2020 also amends several other normative acts regarding the prevention and fighting of money laundering and terrorist financing. The main changes concern the definition of the beneficial owner, the granting of unrestricted access to information regarding the beneficial owner, as well as certain obligations in the field of virtual currency systems. This article focuses on certain aspects related to determining and declaring the beneficial owner

1. The amendment of the definition of beneficial owner provided by Law no. 129/2019 on preventing and fighting money laundering and the financing of terrorism (hereinafter referred to as “Law 129/2019”)

1.1. The amendment of the beneficial owner’s definition for companies

The definition of the beneficial owner no longer applies only to companies governed by Romanian law, but also to foreign corporate entities. As a result, in determining the beneficial owner, the provisions of the Romanian law will also apply to companies governed by foreign law that hold shares in a company governed by Romanian law.

A similar clarification would have been useful in relation to the provisions on trusts or similar legal structures or on non-profit legal persons, as the practice of trade registries in the country is inconsistent in interpreting the applicability of these provisions to foreign corporate entities. Some trade registries have rejected the determination of the beneficial owner in this way and therefore in the absence of a clarification from the legislator, the legal practice will likely continue to be divergent and result in different determinations of the beneficial owners in similar or even identical situations.

The new legislation presents a clarification regarding the criteria for determining the beneficial owner and sets out three criteria:

(i) ownership criterion

Ownership can be direct or indirect and it manifests itself through the direct or indirect exercise of the property right. A shareholder holding 25% plus one of the shares or a natural person holding 25% plus one of a company’s share capital represents an indication of a direct exercise of the ownership. A private corporate shareholder which is managed by a natural person or by several foreign corporate entities (which are as well managed by the same natural person) holding 25% plus one of the shares of a domestic company or holding 25% plus one of the capital of a domestic company represents an indication of an indirect exercise of the property right.

The latter analysis applies to a scenario which, despite not generating opposing opinions in practice, was not regulated by the legislation. The scenario is that of a natural person who holds more than 25% plus one of the shares of a Romanian company through several other foreign corporate entities which, on an individual basis, do not hold more than 25% plus one of the shares of the same Romanian company.

(ii) control criterion

According to the legal provision, the exercise of ownership may be achieved directly or indirectly through control, not only through possession, the concept of “control” not being defined in Law 129/2019, as amended by GEO 111/2020. However, this criterion is assessed by reference to the direct or indirect exercise of ownership over 25% plus one of the shares or participation in the capital of a company.

(iii) control by other means criterion

We further note that the law does not define the term “control by other means”. Consequently, we anticipate that these legal provisions will continue to raise issues regarding their interpretation in practice. Romanian companies will need to conduct their own legal analysis and will need to consider the criterion “control by other means” alongside the criterion of ownership.

The control by other means may be accomplished independently of the direct or indirect exercise of ownership of more than 25% plus one of the shareholding interests, including, for example, by having the right to appoint the majority of the governing bodies of a company or by having special voting right or other special rights attributed through the articles of association of the Romanian company or through a shareholders’ agreement. According to the recommendations of the Organization for Economic Co-operation and Development (OECD), control may be exercised by influencing decisions through family members, through other connections with the ones who have decision power within the company, through the ownership of negotiable instruments or through holding of convertible shares within a company.

1.2. *Senior managing officers*

According to the previous version of the law, after having exhausted all possible means and provided there are no grounds of suspicion, no natural person is identified as the beneficial owner or, if there were doubts as to whether the identified natural person was the beneficial owner, the person or persons exercising the management of the legal person were deemed beneficial owners.

The new form of the law expressly refers to senior managing officers, without defining what this means, but providing certain examples. From our point of view, we cannot rule out the possibility of declaring more persons among the senior managing offices, to the extent that they have shared competencies (for example, depending on competencies, both board members and managers may be beneficial owners). Therefore, it becomes even more important to analyse the entire context of the internal regulations of each company, taking into account the provisions of the articles of association, management contracts, decisions of the boards of directors delegating responsibilities to managers and other policies and rules by which the management of the relevant legal entity is governed.

A question that was raised in the past in practice was whether the notion of beneficial owner could include those persons who ensured the management of one of the legal entities that owned the legal entity in Romania. Interpretations varied here as well.

1.3. *Amendments to the definition of beneficial owner for trusts or other entities with a similar legal construction*

Determining the beneficial owner in the case of trusts or legal entities with a similar structure may be more difficult than in the case of companies as these are generally complex legal constructions in which there is usually no ownership of any part of the assets or capital of these persons.

Additionally, from a Romanian legal perspective, it could be difficult to identify the beneficial owner in the case of a combined structure (Romanian company owned directly or indirectly by a trust or a legal construction similar to the trust).

We note that in the case of trusts and similar legal constructions, the law does not reiterate the provision regarding their applicability to foreign corporate entities. As a result, it remains unclear

whether these provisions could be applied by analogy to determine the beneficial owner in the case of a trust or a similar legal construction, and one cannot rule out the interpretation favoring an analogous assessment.

In the case of trusts or similar legal constructions, the following will be declared:

- 1.3.1. the settlor(s), as well as the persons designated to represent his/her interests in accordance with the law, as opposed to the old form of the law which referred only to the settlor(s);
- 1.3.2. the trustee(s);
- 1.3.3. the beneficiary/beneficiaries or where the individuals benefitting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the trust or similar legal construction is established or operates;
- 1.3.4. any other natural person exercising ultimate control over the trust or over a similar legal construction under foreign law through the direct or indirect exercise of the right of ownership or by other means.

The new form of the law no longer includes protectors among those who will be declared beneficial owners. Also, the new form of the law clarifies that all of the above persons will be declared beneficial owners. We believe that the law establishes an absolute assumption that these persons are beneficial owners of a trusts or of a similar legal constructions regardless of whether or not they exercise control over these entities, similar to the recommendations of the OECD and the FATF (Financial Action Task Force)¹.

1.4. Introduction of the definition of beneficial owner for non-profit legal entities

Unlike the previous form, non-profit legal entities (such as non-profit associations and non-profit foundations) will no longer be subject to the provisions regulating trusts. The legislator issued a specific regime for these. The beneficial owners of non-profit legal entities will be:

- 1.1.1 associates or founders;
- 1.1.2 members of the managing council/ board of directors;
- 1.1.3 the persons with executive functions empowered by the council to exercise its attributions;
- 1.1.4 in the case of associations, the category of natural persons or, as the case may be, the natural persons in whose main interest they have been constituted, respectively, in the case of foundations, the category of natural persons in whose main interest they have been constituted;
- 1.1.5 any other natural person exercising ultimate control, by any means, over the non-profit legal person.

The legislator did not clarify whether in the case of non-profit legal entities all the indicated persons will be declared beneficial owners (as he did in the case of trusts), this being another matter subject to interpretations and debate.

In this case as well the law fails to clarify whether the provisions related to determining the beneficial owner apply when looking at foreign entities. As a result, it remains unclear whether

¹ Romania is not a member of the FATF, but collaborates with this international body through the Moneyval Committee (associate member of the FATF), a committee of which Romania is a member.

these provisions could be applied by analogy to determine the beneficial owner in the case of a non-profit legal entity that has control over a company governed by Romanian law.

1.2 The beneficial owner for other legal entities besides the ones mentioned above and for the entities that manage and distribute funds

The beneficial owners in the case of these entities will be:

- 1.2.1 the natural person benefiting from at least 25% of the assets, respectively the shares of a legal person or of an entity without legal personality, if the future beneficiaries have already been identified;
- 1.2.2 the group of persons in whose main interest a legal person or entity without legal personality is established or operates, if the natural persons benefiting from the legal person or legal entity have not yet been identified;
- 1.2.3 the natural person or persons exercising control over at least 25% of the assets of a legal person or entity without legal personality, including by exercising the power to appoint or remove a majority of the members of the administrative, management or supervisory bodies of that entity;
- 1.2.4 the natural person or persons ensuring the management of the legal person, if, after all diligence and provided there are no grounds for suspicion, no natural person is identified in accordance with the above points or if there is any doubt that the identified person is the beneficial owner, in which case the reporting entity is obliged to keep records of the measures applied to identify the beneficial owner in accordance with the above points and this point.

2. Changes regarding the obligation to submit the declaration regarding the beneficial owner to the Trade Register

The obligation to declare the beneficial owner will be deemed fulfilled upon the incorporation of a company if the information related to the beneficial owner and the type of control is included in the articles of association. Moreover, any subsequent modification of the identification data of the beneficial owner does not trigger an obligation to amend the articles of association, a separate declaration being sufficient. From the wording of the law, we understand that the amendment of the articles of association in case of amendment of the beneficial owner is not mandatory, but may be seen as an alternative way of fulfilling the obligation along with the affidavit of the undertaking's legal representative.

As an important practical comment, the declaration regarding the beneficial owner may be given under private signature or may be signed electronically, and may be submitted to the Trade Register Office without any other formality, by electronic means, with an electronic signature, by e-mail or by courier.

3. The information regarding the beneficial owner becomes accessible to any person, without the need for such person to justify an interest

New rules are set regarding access to information on beneficial owners. Previously, access to public registers regarding the beneficial owner was conditional upon justifying interest. Currently, access is granted to any person filing an electronic request and paying the interrogation fees.

Access to the registers is provided subject to compliance with the provisions on the protection of personal data. Natural and legal persons have the right of access to the name and surname, month and year of birth, nationality, and country of residence of the beneficial owner, as well as to information regarding the nature and the importance of the benefit generating interest.