

Identification of Beneficial Owner in Light of Tax Procedure Law General Communiqué Numbered 529

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Tax Procedure Law General Communiqué Numbered 529

Tax Procedure Law General Communiqué Numbered 529 («Communiqué») entered into force upon its publication in the Official Gazette numbered 31540 and dated 13 July 2021.

In the Communiqué, which aims to prevent tax evasion by revealing the real names behind the income and wealth, an obligation to identify the beneficial owner and an obligation to notify beneficial ownership information to the Revenue Administration («RA» or in Turkish: Gelir İdaresi Başkanlığı) have been introduced in order to determine the beneficial owner information of taxpayer legal persons and unincorporated entities in an up-to-date, complete and accurate manner.

As a matter of fact, the identification and notification of the beneficial owner is not a new issue. In the Regulation on Measures Regarding the Prevention of Laundering Proceeds of Crime and the Financing of Terrorism («Measures Regulation») published on 09.01.2008, the obliged parties who are responsible for fulfilling the obligations arising from the Turkish AML Legislation (e.g. identification of the beneficial ownership) are determined (see page 4). In this context, it is currently obligatory for the obliged parties determined within the framework of the Measures Regulation to identify the beneficial owners of their customers and to submit the information and documents regarding the beneficial ownership of their customers to the Financial Crimes Investigation Board ("MASAK") upon request. In addition, the issue of identification of the beneficial owner has been regulated in the related secondary regulations together with the Measures Regulation. Regarding the implementation of this regulation, Communiqués No. 5, 7, 8, 13 and 19 have been published between 2008 and 2021. Also, the «Identification of the Beneficial Owner Guide» has been published by MASAK. Moreover, the regulations regarding the beneficial ownership in both Turkish AML Legislation and Communiqué have been put into force by taking into account the 24th Recommendation of the Financial Action Task Force ('FATF').

In the Communiqué, in parallel with the Turkish AML Legislation, the obligation to notify the beneficial ownership information of their customers to the RA is regulated for the obliged parties listed in the Measures Regulation. Most importantly, the Communiqué regulates that all corporate taxpayers (and the individual authorized to represent the company in unlimited companies or the shareholder, one of the limited shareholders in limited partnerships and the individual who holds the highest shares in unincorporated partnerships, managers, trustees or representatives of trusts and similar establishments who have their headquarters in Turkey or have been established in a foreign country with a resident manager in Turkey) are obliged to annually report their own beneficial ownership information to the RA.

Who is the Beneficial Owner?

In the guide titled «Transparency and Beneficial Ownership» published by FATF, the beneficial owner is defined as the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It is also stated that the beneficial owner includes those persons who exercise ultimate effective control over a legal person or arrangement. Measures Regulation defines beneficial owner as «the natural person or persons who have ultimate effective control over the natural persons, legal persons or unincorporated entities on whose behalf transactions are made». Therefore, it is understood that the beneficial owner must be a natural person. The Communiqué defines beneficial owner as «the natural person or persons who have ultimate control or ultimate effective control over the legal persons or unincorporated entities». As can be seen, the definition of beneficial owner in the Measures Regulation and the Communiqué are in harmony.

Beneficial Owner in Legal Entities

- a) Natural persons who have more than 25% shares
- b) Natural persons who have ultimate control over the legal entity, if the natural persons holding more than 25% shares of the legal entity are suspected not to be the beneficial owner or if there is no natural person holding over 25% shares
- c) Natural persons with the highest level of executive power, if the beneficial owner cannot be identified according to aforementioned subparagraphs (a) and (b)

Beneficial Owner in Unincorporated Entities such as Business Partnerships¹

- a) Natural persons who have ultimate control over these entities
- b) Natural persons with the highest level of executive power, if the beneficial owner cannot be identified based on above

Beneficial Owner in Trust² and Similar Entities

Founders, trustees, directors, auditors, those who have beneficiary titles or those who have effective control over these entities.

¹ Unincorporated partnerships and investment funds are examples of such entities.

² In Turkish Law, the term «trust» as a legal instrument has been defined for the first time with the Communiqué, and it is necessary to clarify what «similar entities» are. The term «trust and similar entities» is similar to the term «trusts and similar legal arrangements» in EU AML regulations. Trust is a concept of Common Law and there is no known example in Turkey, as in many other European countries that have adopted the Continental European legal system (Civil Law). In addition, in the «Notification Form Regarding the Beneficial Owner», it is stated that in cases where the founders, trustees, etc. of the trust and similar entities are legal persons, the natural person holding more than 25% of shares of the legal entity must be declared as the beneficial owner of the trust. For example, if the trustee of a trust established abroad is company C, natural person Y who owns more than 25% of the shares of company C will be the beneficial owner of the trust.

Obligation to Notify Beneficial Ownership Information

With the Communiqué, both (a) institutions and organizations that will notify their own beneficial ownership information to RA and (b) institutions and organizations that are deemed as obliged parties under the Measures Regulation and that will notify the beneficial ownership information of their customers to RA have been determined.

A. INSTITUTIONS AND ORGANIZATIONS TO NOTIFY THEIR OWN BENEFICIAL OWNER

- i. Corporate taxpayers
- ii. The individual authorized to represent the company in unlimited companies or the shareholder
- iii. one of the limited shareholders in limited partnerships
- iv. The individual who holds the highest shares in unincorporated partnerships,
- v. Managers, trustees or representatives of trusts and similar establishments who have their headquarters in Turkey or have been established in a foreign country with a resident manager in Turkey

are obliged to share information annually regarding their own beneficial owners with RA.

This requirement applies to all of the entities listed above that are in operation or in the process of liquidation as of August 1, 2021.

B. INSTITUTIONS AND ORGANIZATIONS TO NOTIFY BENEFICIAL OWNER OF THEIR CUSTOMER

In the Communiqué, it is regulated that «the obliged parties» (including their branches, agencies, representatives, commercial proxies and similar affiliated units) that are responsible for the implementation of the Turkish AML Regulation are also obliged to share their customers' beneficial owner information with RA upon request. In addition, the obliged parties listed under Measures Regulation are also indicated in Communiqué, and these institutions and persons are shown on the right-hand side of this page.

Obliged Parties to Notify Their Customers' Beneficial Ownership Information Upon Request

- i. Banks
 - ii. Institutions other than banks who have the authority to issue debit cards or credit cards
 - iii. Authorized exchange offices given in the foreign exchange legislation
 - iv. Financing and factoring companies
 - v. Capital markets brokerage houses and portfolio management companies
 - vi. Payment institutions and electronic money institutions
 - vii. Investment partnerships
 - viii. Insurance, reinsurance and pension companies, and insurance and reinsurance brokers
 - ix. Financial leasing companies
 - x. Institutions furnishing settlement and custody services within the framework of capital markets legislation
 - xi. Borsa İstanbul A.Ş. (Incorporation) pertaining only to its custody service related with Precious Metals and Precious Stones Market
 - xii. PTT Corporate (Company of Post and Telegraph Organization) and cargo companies
 - xiii. Asset management companies
 - xiv. Those who buy and sell precious metals, stones and jewelries and intermediaries of these transactions
 - xv. Directorate General of Turkish Mint pertaining only to its activities of minting gold coins
 - xvi. Precious metals intermediaries
 - xvii. Those who buy and sell immovable for trading purposes and intermediaries of these transactions
 - xviii. Dealers of any kind of sea, air and land transportation vehicles including construction machines and intermediaries of these transactions
 - xix. Dealers and auctioneers of historical artifacts, antiques and works of art
 - xx. Those who operate in the field of lotteries and bedding including Turkish National Lottery Administration, Turkish Jockey Club and Football Pools Organization Directorate
 - xxi. Sports clubs
 - xxii. Public notaries
 - xxiii. Freelance lawyers pertaining only to functions within the scope of paragraph 2 in article 35 of Law numbered 1136 on Lawyers such as trading of immovable establishing, managing and transferring companies, foundations and associations provide that these functions are not contrary, in terms of right of defending, to provisions of other laws
 - xxiv. Certified general accountants, certified public accountants and sworn in certified public accountants operating without being attached to an employer
 - xxv. Independent audit institutions authorized to conduct audit in financial markets
 - xxvi. Crypto-asset service providers
 - xxvii. Savings financing companies
- and their branches, agencies, representatives and commercial agents and similar affiliated units

Briefly, it is obliged that all corporate taxpayers and some institutions and organizations shall regularly notify their beneficial owner information and some institutions and organizations shall notify their customers' beneficial owner information upon request to the RA.

Principles Regarding Notifications to Revenue Administration

Persons Under Notification Obligation	Timing of Notification	How Should The Notification Be Made?	Informations to be Notified	Retention Period of the Information Subject to the Notification
Corporate Taxpayers	First Notification: August 31, 2021 Following Notifications: When the advance corporate tax returns and annual corporate tax returns submitted	First Notification: «Notification Form Regarding Beneficial Owner "filled in accordance with the explanations on the Internet Tax Office (Turkish: İnternet Vergi Dairesi) website must be submitted through Internet Tax Office website Following Notifications: within the annexes of the advance corporate tax returns and annual corporate tax returns	<ul style="list-style-type: none"> Name and surname, Citizenship (country/countries of citizenship), Identity number of the country of citizenship, Address information, If available, contact information (phone number, fax number and e-mail address), and Reason for beneficial ownership status of the beneficial owner have to be notified. 	The information subject to the notification must be kept by the taxpayers for 5 years starting from the beginning of the calendar year following the date of the notification.
Taxpayers and individuals other than corporate taxpayers	First Notification: August 31, 2021 Following Notifications: Until the end of August of each year	First and Following Notifications: «Notification Form Regarding Beneficial Owner "filled in accordance with the explanations on the Internet Tax Office (Turkish: İnternet Vergi Dairesi) website must be submitted through Internet Tax Office website	How Can This Information Be Accessed? Taxpayers can access this information through the following: <ul style="list-style-type: none"> -Beneficial owner's own statement, -Trade registers, -Company shareholders, -Public sources etc. 	

Access to the «Notification Form Regarding Beneficial Owner»

Revenue Administration announced that the «Notification Form Regarding Beneficial Owner» can be accessed through «Other Notification and Information Input» menu of Internet Tax Office.

Penalty For Non-Compliance

Taxpayers that fail to report and taxpayers that report incomplete or misleading information will be subject to «special irregularity penalty» specified in the Repeated Article 355 of Tax Procedural Law No. 213

ISSUES REQUIRING FURTHER CLARIFICATION

A) Role of Shareholding in Identification of Beneficial Owner

As it is understood from the definition of beneficial owner regulated in both Measures Regulation and Communiqué, the main purpose of identification of beneficial owner is to reveal **natural person or persons who have ultimate control or ultimate influence over** the legal persons or unincorporated entities.

On the other hand, having more than 25% shares in a legal entity is an indicator of having ultimate control within the Communiqué.

1. Whether it is necessary to notify both real persons as a beneficial owner in the case there is a natural person who has ultimate control over legal entity and also a natural person holding more than 25% shares

Although in the Communiqué, holding more than 25% shares in a legal entity is regulated as an indication of having ultimate control, when the examples of foreign practice are observed, it is understood that the rate of 25% is determined as a “**threshold**”. Also, in the case there are natural person (s) holding ultimate control over legal entity, those natural person(s) should be accepted as beneficial owner. In other words, in identification of the beneficial owner, both shareholding rate over 25% and measure of control over the legal entity should be considered and it should be taken into account that beneficial owner may also be natural person(s) holding ultimate control of the legal entity regardless of the share rate in legal entity. For example, although only 10% of shares are held, the shareholders who have power to appoint or dismiss the majority of board of directors are deemed to have ultimate control over legal entity and therefore are the beneficial owner.

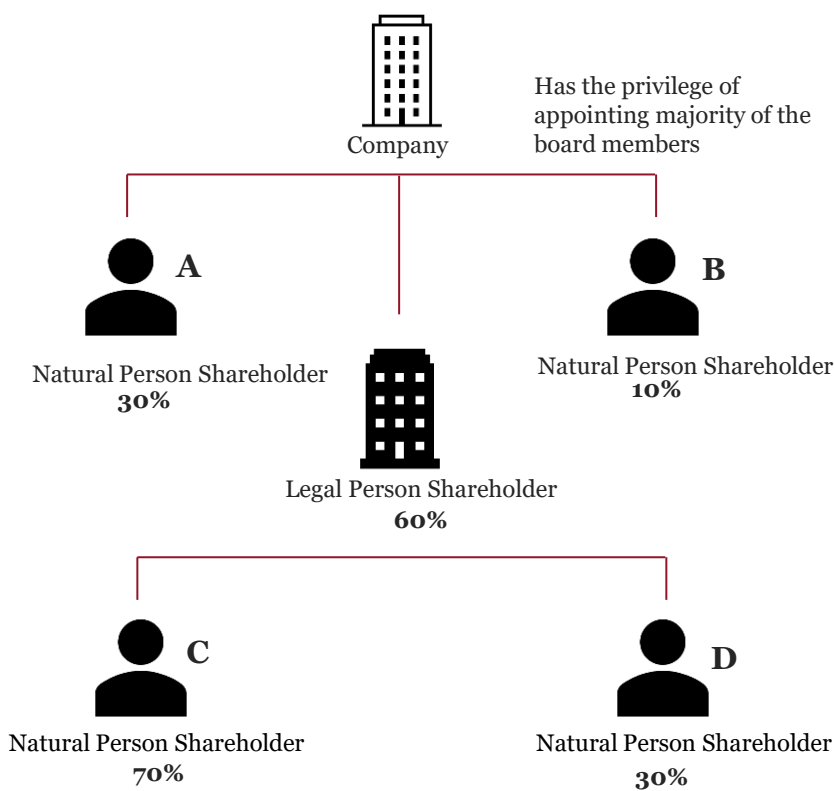
It is seen in foreign practices (such as Luxemburg)³ that both natural person(s) who have ultimate control and natural person(s) holding more than 25% shares should be notified to RA.

In this context, in order to avoid any risk it is suggested that the natural person(s) holding ultimate control as well as the natural person(s) holding more than 25% shares in legal entity should be notified to RA.

An individual can have ultimate control over a legal entity through shareholding or by other means. Individuals in the following cases are assumed to have ultimate control over the legal person:

- Persons responsible for key management decisions
- Persons to whom the control of the legal entity is relinquished through the articles of association or the shareholders' agreement
- Former shareholder or board member with significant influence over the legal entity
- Persons who have the right to use all or part of the assets of a legal entity
- Persons who are a former shareholder or director but continue to exercise significant influence over the legal entity
- Persons who have significant influence over the legal entity through family ties

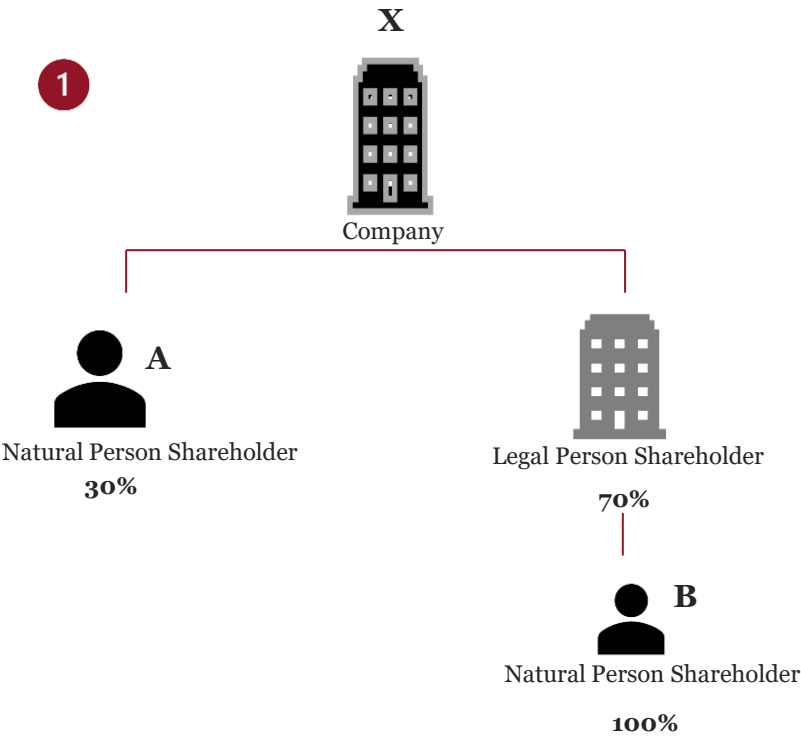
The diagram below represents an exemplary case. In this example, individual (B) has ultimate control as s/he has the privilege to appoint the majority of the board members. For this reason, individual (B) is the beneficial owner. In addition, individual (A) is a direct shareholder and (C) is an indirect shareholder of the company. It is recommended that individuals (A) and (C) be declared as beneficial owners as well, since each of them has more than 25% shares in the company.



ISSUES REQUIRING FURTHER CLARIFICATION

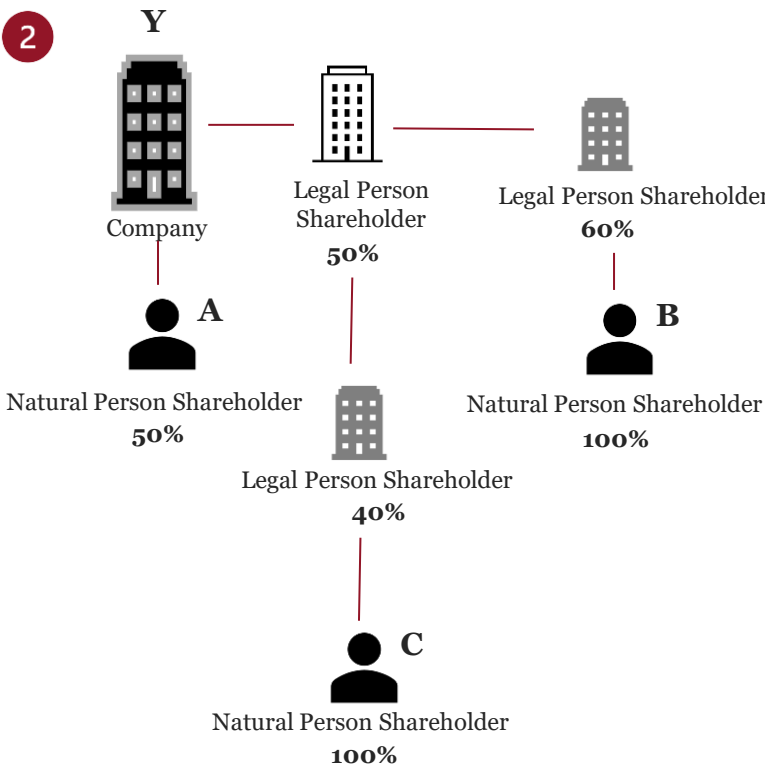
2. Whether the natural person(s) will be notified as beneficial owner where the natural person(s) having more than 25% shares indirectly over legal entity

In the Communiqué beneficial owner is defined as "the natural person(s) who have ultimate control" and shareholding is also included in criteria on identification of beneficial owner. In parallel, as can be understood from Form Regarding Beneficial Owner prepared by RA, beneficial owners who are indirect shareholders in legal entity should also be notified to RA. Also, as seen from both guidelines published by OECD and FATF⁴ and foreign practices (such as: Switzerland and Luxemburg)⁵, it does not matter whether the ultimate control is exercised directly or indirectly when identifying the beneficial owner. In other words, if natural person(s) have more than 25% shares in the legal entity, whether indirectly or directly, such natural person(s) should be accepted as beneficial owner.



In the diagram no:1 above, individual (A) directly holds 30% of the shares. Individual (B) indirectly holds 70% of the shares. Therefore, (A) and (B) must be identified as beneficial owners.

In the beneficial ownership notification to be made by filling out the «Notification Form Regarding Beneficial Owner», indirect shareholding should be taken into account as well as direct shareholding.



In the diagram no:2 above, in company (Y); (i) individual (A) directly holds 50% of the shares, (ii) individual (B) indirectly holds 30% of the shares and (iii) individual (C) indirectly holds 20% of the shares. Therefore, (A) and (B) must be identified as beneficial owners.

4 <https://www.fatf-gafi.org/media/fatf/documents/reports/guidance-transparency-beneficial-ownership.pdf>
5 <https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf>
6 <https://cdhf.ch/de/bf/normen/7t=D-01-21&n=34&l=en>

ISSUES REQUIRING FURTHER CLARIFICATION

B) Natural Person(s) With the Highest Level of Executive Power as Beneficial Owner(s)

In order to identify natural person(s) with highest level of executive power as a beneficial owner; it is required that there is no natural person (i) holding more than %25 shares in the legal entity and (ii) having ultimate control over the legal entity. However, identification of **highest level executive officer** in the legal entity as beneficial owner should only be used as a **last resort**. Besides, in foreign practices, it is seen that it is not considered a correct approach to assume that highest level executive officer has ultimate control over the legal entity based solely on executive powers, without showing the best effort to identify those who actually have ultimate control. Because when the executive officers of the legal entity exercise their executive powers – in other words when they manage the legal entity, they often act in the interests and as a representative of those who actually have ultimate control. In this case, highest level executive officer in the legal entity is not the beneficial owner.

There is no regulation in the Communiqué regarding what title an individual should hold in the company to be considered as the highest level executive officer. In addition, it is not the title of the individual that should be considered when identifying the highest level executive officer, but the authority that the individual has related to the management and representation of the legal entity. For example, an individual may be considered as the highest level executive officer, if the individual has (i) the authority to make strategic decision that fundamentally affect the business practice in legal entity (ii) significant responsibilities regarding the management of the legal entity (iii) significant control over the daily or general affairs of the company or (iv) the authority given by managing body of the company regarding planning, managing and controlling the activities of the company directly or indirectly.

In international practices, it is seen that the chairman of the board of directors, CEO, CFO and COO are generally identified as the highest level executive officer.

As a matter of fact, according to «Guidance on Transparency And Beneficial Ownership" published by FATF, it is stated that the following persons can be considered as the highest level executive officer in a legal entity:

- a) The natural person(s) responsible for strategic decisions that fundamentally affect the business practices or general direction of the legal person. (*e.g. board members, chairman*)
- b) The natural person(s) who exercises executive control over the daily or regular affairs of the legal person through a senior management position, (*e.g. CEO, CFO*)

In addition, in foreign practices, it is seen that one person is generally determined as the highest level executive officer of the legal entity, except for the cases where the executive authority is jointly held. However, in cases where the executive authority is jointly held by more than one person and one of them does not have more authority than the others, each of those individuals holding executive authority can be identified as the beneficial owner.

The company's highest level executive officer may be someone other than the individual holding the highest position in the company. It is possible to come across examples where the chairman of the board of directors or the CEO or the CEO and CFO together are the individual(s) with the highest executive authority in company. For this reason, it would be best for each company to determine the highest level executive officer by evaluating its own internal dynamics. In such an evaluation, it is recommended that the individual(s) authorized to make strategic decisions and direct company's activities be determined as the highest level executive officer(s).

ISSUES REQUIRING FURTHER CLARIFICATION

Frequently Asked Questions	Our Approach
Who will be the beneficial owner if some of the company's shareholders are granted privileges?	If these privileges enable individuals to have ultimate control over the company, these individuals must be identified as beneficial owners. For example: privilege to appoint the majority of the board members
If one shareholder owns less than 25% of a company but has ultimate control over the company, while another shareholder owns more than 25% of the company, who will be identified as the beneficial owner?	It is recommended to notify to RA both the natural person controlling the company and the natural person holding more than 25% of the shares. <i>(for more information, please see page 6)</i>
What are the objective criteria to consider when determining whether an individual has ultimate control?	Whether the individual has ultimate control or not should be evaluated on a case-by-case basis. <i>(for exemplary cases in which the individuals are assumed to have ultimate control over the legal person, please see page 6)</i>
Should the individual who indirectly owns 25% of the company be notified?	Yes, the individual must be notified to RA.
If 2 shareholders are from the same family in a company where there are 5 shareholders in total, should these 2 persons be identified as the beneficial owners?	In case these individuals have ultimate control over the legal entity, both of these individuals must be identified as beneficial owners.
How will the notification be made if the individual has both direct and indirect shareholding in the company?	«Direct and Indirect» option should be chosen in section titled «Shareholding Structure» of the Notification Form Regarding Beneficial Owner and the sum of direct and indirect shareholdings should be written in the section titled «Shareholding Ratio in the Company».
Are there any exceptions for public companies regarding notification of the beneficial owner to RA?	No. Public companies must also comply with regulations of the Communiqué.

C) Identification of Beneficial Owner in Companies Controlled by Public Authorities

There is no explicit regulation regarding this matter in neither the Measures Regulation nor the Communiqué. However, considering that it is regulated in the Measures Regulation and the Communiqué that the natural person with the highest level executive authority in the legal entity will be accepted as the beneficial owner in the event that no other natural person can be determined as beneficial owner; we are of the opinion that the highest level executive officer of the company controlled by the public authority, not the public authority's highest level executive officer, should be identified as the beneficial owner.⁷

⁷ In foreign practices, there are examples where the individuals holding a senior management position within the public authority are identified as the beneficial owners in companies where the public authorities are the shareholders and/or in companies that are managed by the public authorities and do not have natural person shareholders. Again, in foreign practices, the governing body of the public legal entity, the board members, the state representative who is a member of the board of directors, and the minister responsible for the public authority are shown as examples to the highest level executive officer.

⁸ As a rule, this exception is only valid for the obliged parties operating in Turkey and does not cover the cases where the financial institution is in a foreign country. However, if the financial institution operating in a foreign country is resident in a country that has adequate regulations and supervision regarding the prevention of money laundering and financing of terrorism, it will be able to take advantage of the exception specified in the Communiqué Numbered 5. (<https://masak.hmb.gov.tr/sikca-sorulan-sorular>)

⁹ It has been stated that the obligations regarding the notification of the beneficial owner to RA may not be complied with in transactions where the customer or the customer's majority shareholder that holds more than 50 percent of the shares of the customer is a company whose shares are quoted in Borsa İstanbul Anonim Şirketi.

D) Cases Where Identification of Beneficial Owner is not Necessary

With the Measures Regulation and the Financial Crimes Investigation Board General Communiqué Numbered 5 ("Communiqué Numbered 5"), the cases in which simplified measures can be applied are regulated. In the light of the aforementioned regulations, simplified measures can be applied in the following cases, and in these cases, identification of the beneficial owner is not necessary. In other words, it is not obligatory to identify the customer's beneficial owner in the following cases:

- In transactions realized between financial institutions⁸
- In cases where the customer is an organization such as the International Monetary Fund, the World Bank, the European Development Bank or an embassy or consulate residing in Turkey
- In transactions where the customer is a public administration or a public institution
- In transactions related to pension contracts, pension plans and life insurance contracts
- In transactions where the customer is a public company whose shares are listed on the stock Exchange⁹

There is no explicit regulation regarding simplified measures in the Communiqué. This will raise the question of whether the beneficial owner will be notified to the RA within the scope of the Communiqué in cases where simplified measures can be applied. In our opinion, simplified measures can be applied in cases where the identification of beneficial owner of the customer is required because (i) regulations regarding beneficial ownership in the Communiqué and the Measures Regulation are parallel and (ii) while simplified measures are not regulated in the Communiqué, there is also no regulation prohibiting the application of simplified measures. However, since the simplified measures are related to the identification of the beneficial owner of the customers, we consider that the simplified measures will not be applicable in cases where institutions are obliged to notify their own beneficial owners to the RA pursuant to the Communiqué.

In summary, in the above-mentioned cases, it is considered that it is not obligatory to notify customer's beneficial owner to RA. However, the obligation to notify own beneficial owner to RA continues unless the RA adopts a contrary approach.

ISSUES REQUIRING FURTHER CLARIFICATION

E) Identification of Beneficial Owner in Funds

Funds can be broadly defined as asset pools with no legal personality. In these structures, the funds collected from investors are pooled together and used in the investment to be made in accordance with relevant legislations and investment strategy of fund.

Although this subject lacks clarity, it is understood that the funds are defined as «Unincorporated Entities Such As Business Partnership» within the scope of the Communiqué and the Measures Regulation. Therefore, the natural person(s) having ultimate control over funds need to be known and the management structure of funds needs to be examined in order to identify the beneficial owner in funds.

In this context, it is important whether the funds are structured to give the investor ultimate control over the fund.

For example, in private equity investment funds and real estate investment funds, it is possible for the investor to be in the investment committee and have ultimate control over the fund in the case such a privilege is granted to the investor. However, in order for such an investor to be qualified as the beneficial owner, it is not sufficient for the investor to be in the investment committee alone. If the investor plays an active role in the decisions taken by the investment committee (for example: if a decision cannot be taken without the investor's affirmative vote, or if the investor has the final veto right on the decisions to be made), the investor(s) in question can be identified as the beneficial owner(s). Because, in this case, the investor has ultimate control over the fund. However, if there is no investor in the investment committee of the fund or the investor does not have an effective control over the decisions although s/he is in the investment committee, then it can be said that the Portfolio Management Company («PMC») has the ultimate control over the fund. Thus, those who manage these funds are the PMCs. In this case, the identification of the beneficial owner of the PMC is made by taking into account the criteria regarding the identification of the beneficial owner in legal entities in the Communiqué (see page 3).

Investment Funds (IF)	Beneficial Owner (Ultimate Controller)
Private Equity IF/ Real Estate IF	Where investors effectively have a say in the management of the Fund (for example, through the investment committee): Relevant investor(s) If investors do not have a say in the management of the Fund: The beneficial owners of the PMC
Mutual Fund	Unless there is a structure in which investors can have a say in the management of the fund (private and hedge funds will need to be evaluated in this respect): The beneficial owners of the PMC
Private Pension Funds	If investment decisions; are taken with the approval of the Pension Company (for example, by a committee or by any other means): the beneficial owners of the Pension Company are taken by the PMC: The beneficial owners of the PMC

In foreign practices, "ownership interest" is taken into account in identifying the beneficial owners of investment funds, and it is stated that investors that hold 25% or more of the participation units/shares issued are the beneficial owners. However, since investment funds (as they do not have a legal personality) are considered to be in the category of «Unincorporated Entities Such As Business Partnerships» within the framework of the Communiqué, "natural persons who ultimately control" the relevant fund should be considered to be the beneficial owners of investment funds in Turkish practice, unless otherwise stated by the RA.

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