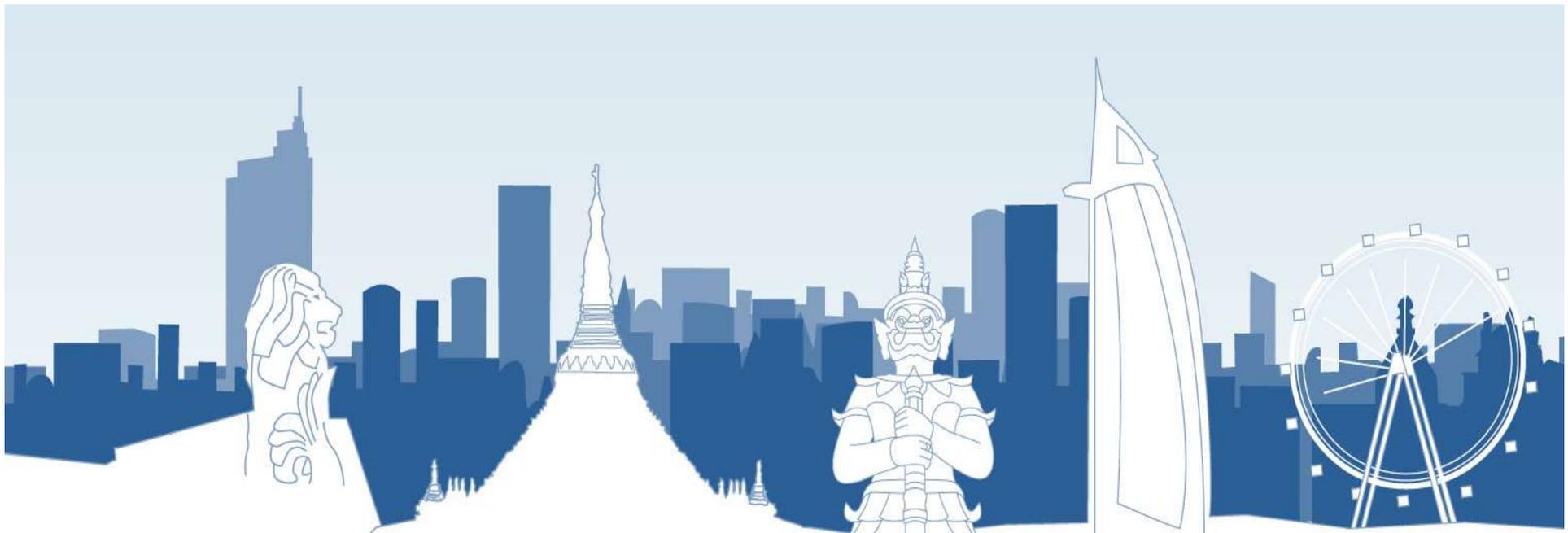




UBO Webinar

The Issue of the Ultimate Beneficial Owner

Theodor Strohal - Jakob Kissler



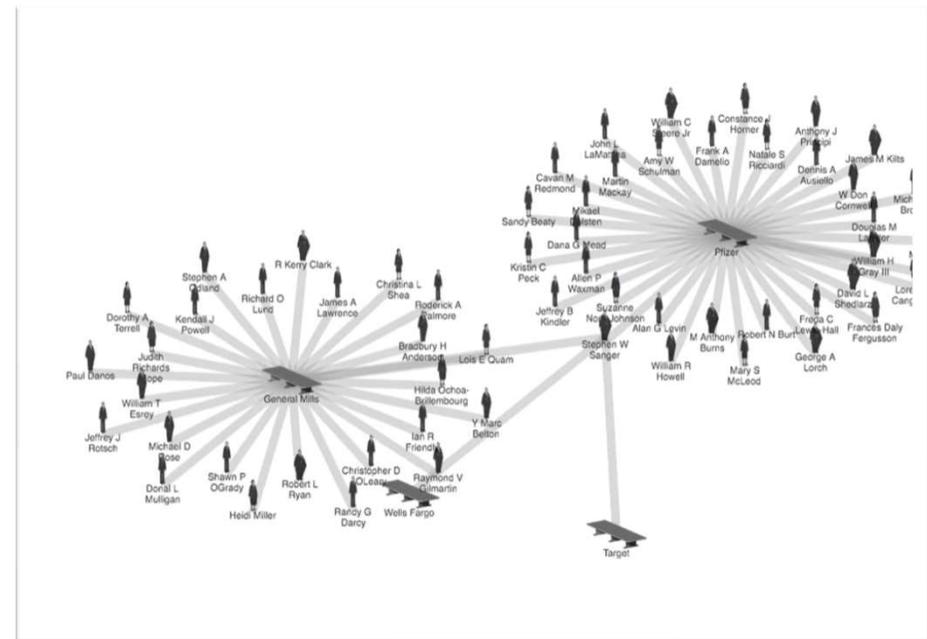
„ultimate“

Latin: „ultimus“ –The last, the hindmost
„ The devil takes the hindmost.“

Who is the HINDMOST?

The ultimate natural
person „who RULES!“

Watch the graphic:
[They Rule – YouTube](#)



Definition



UBOs are **natural persons** who

- ultimately own or control or have the right to vote with a minimum stake/share of the company, whether through direct or indirect ownership (25% EU and FinCEN, 10% FATCA, 20% SEC, for PEPs as low as 1% or 0,01%).
- and/or through the right to appoint or dismiss the majority of the Directors / Managers.

UBO if no natural person holds minimum %?

- If no natural person satisfies the condition above, then any natural person who exercises **control** over the company **through other means** shall be deemed as the UBO.
- If still no natural person satisfies any of the conditions above, then the person who is **responsible for the company's senior management** will be the UBO.

But: each of the numerous AML/CTF regulations has their own distinct thresholds, meaning that organizations have multiple beneficial ownership compliance initiatives to manage.

UAE Resolution No. (58) of 2020 on UBO Procedures

- **Obligatory Registers:** UBO register, (Nominee) Directors' register (if applicable) and a Partners or Shareholders register
- The number of ownership interests held by each Partner or Shareholder, the voting rights attached to them and the date of acquisition of ownership interests.
- Entities must notify changes within 15 days
- If entities do not comply, the UAE Ministry of Economy may impose sanctions on those entities.
- Sustainable executive and regulatory mechanisms and procedures in respect of beneficial owner data.

4th AML Directive of the EU

- Requires EU member states to set up UBO registers for local legal entities.
- Member states have taken different approaches.
- Deadline for implementation of the 4th AML Directive was 26 June 2017, yet debates are still ongoing about details such as who should have access to the registers and how much transparency will be improved in practice.
- The legislative bodies of the EU have recently agreed on an amendment to the Directive which provides for mandatory public access to the registers.

US Regulations

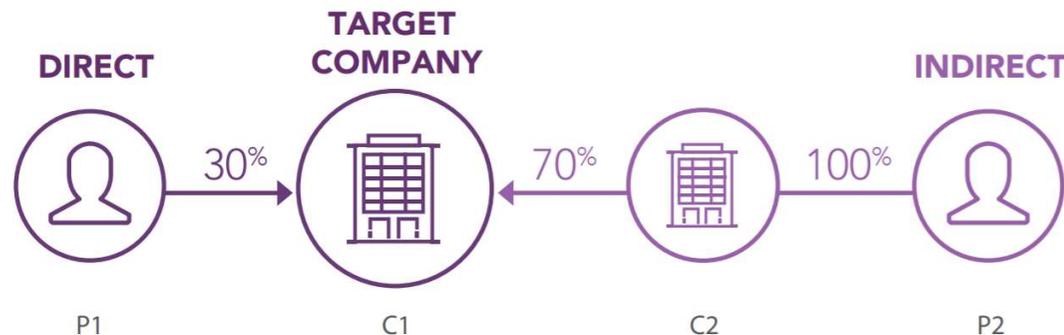
- In May 2018, the Financial Crimes Enforcement Network's (FinCEN) UBO rules went into effect.
- Identification of UBOs and collection of data from basic customer identification program (CIP) as is obtained from individual customers and/or signers.
- Obligations for most financial institutions (banks, credit unions, broker-dealers, futures commission merchants, mutual funds, etc.)
- A covered institution may rely on the UBO information provided by its customer “if it has no knowledge of facts that would reasonably call into question the reliability of the information”

US Corporate Transparency Act

- National Defense Authorization Act for Fiscal Year 2021 (NDAA); effective date 1 January 2021.
- Implements new UBO reporting regime for many U.S. companies, and non-U.S. companies registered to do business in the United States
- Broad implications to financial institutions, service providers, fiduciaries, private clients and family offices, inbound investors, and state agencies alike.
- With respect to private clients, both U.S. and non-U.S. citizen and resident individuals will fall within the NDAA's reach.

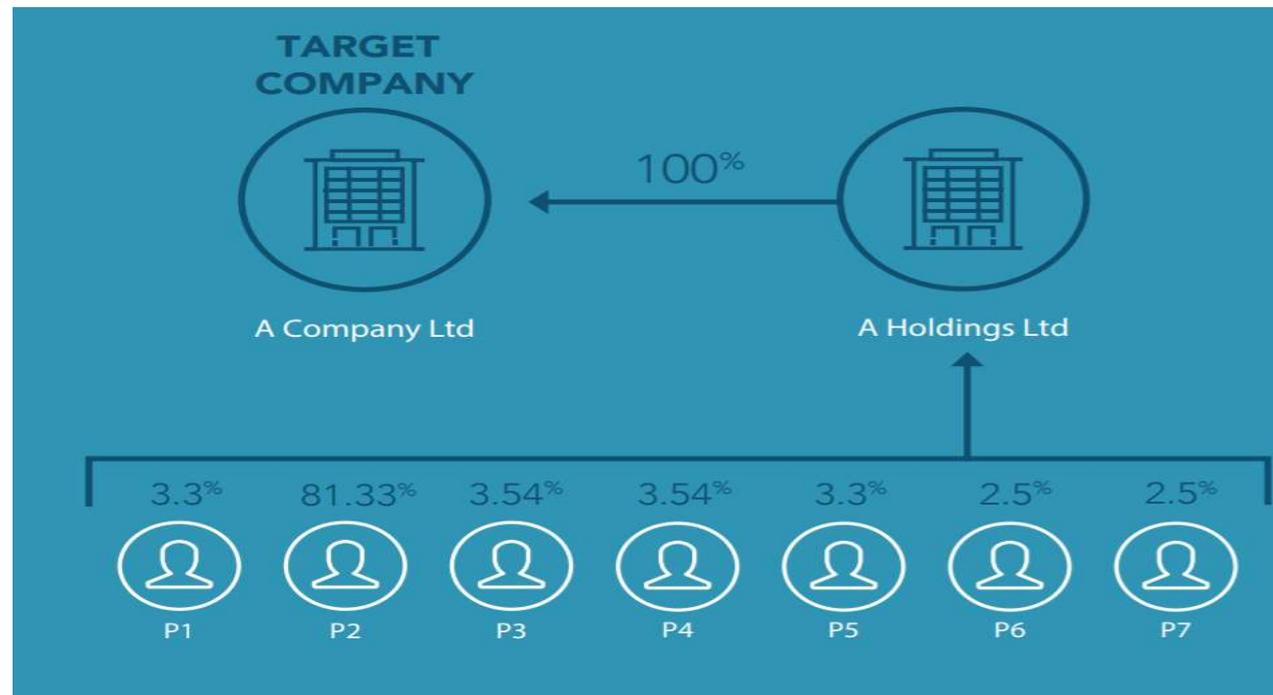
Examples- Simple Direct & Indirect Ownership

Beneficial Ownership is best visualized as a series of direct or indirect relationships. Indirect relationship can be equally simplistic as direct ownership, but in reality, complex structures are common. In the first example (© [Dun & Bradstreet](#)), Person P1 is a direct owner of Company C1 and owns 30% shareholding. Person P2 is an indirect owner of Company C1 and owns 70% shareholding.



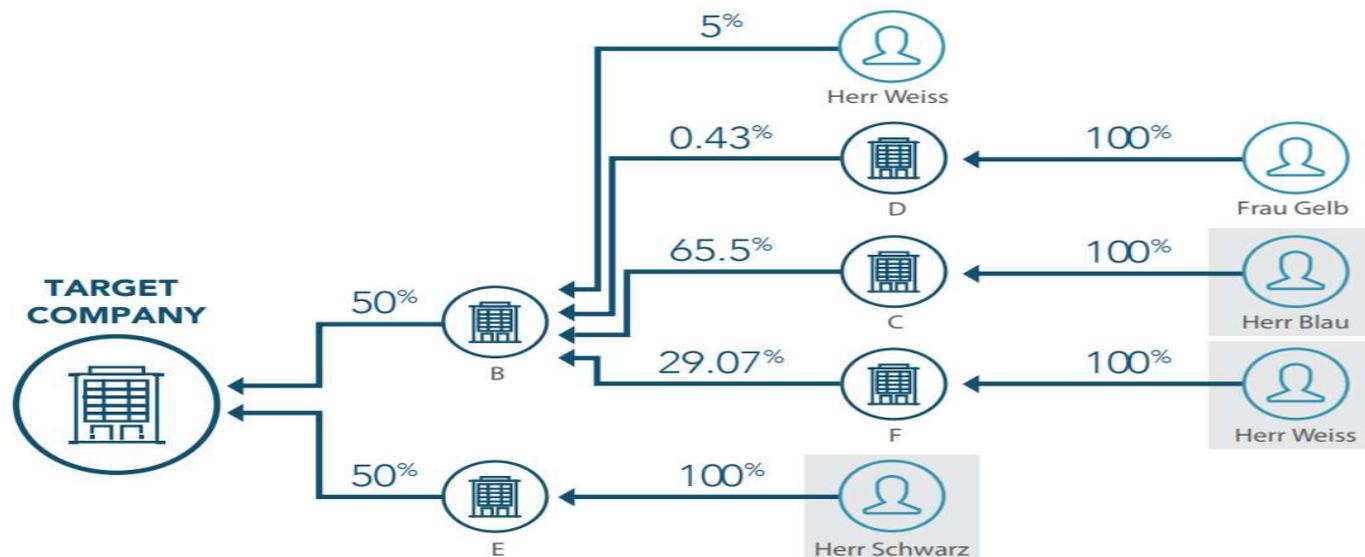
Simple Indirect Ownership

Typical scenario of a more complex ownership structure (© Dun & Bradstreet), where shares are owned by multiple people, and Person 2 has 81.33% ownership of A Holding Ltd.



Multi-Level Indirect Simple Indirect Ownership

Multiple levels of indirect ownership (© Dun & Bradstreet). The three relevant stakeholders are marked in grey. Herr Blau has a 32% interest in target company A ($50\% \times 65\% = 32\%$), Herr Weiss has 14%, and Herr Schwarz has 50%. Note that Herr Weiss has both a direct and indirect interest in Company B.



Six Ways to Investigate the UBO

Robust UBO requires reliable and when necessary, granular investigation.

1. Company Website
2. Corporate Registries
3. EDGAR F (Electronic Data Gathering, Analysis, and Retrieval) or Publicly Traded Companies and their Subsidiaries
4. Search Engines
5. Data and Compliance Websites (LexisNexis Risk, Dun & Bradstreet, Refinitiv and many more)
6. Direct requests to contract partner in case of sensitive business transactions or legal obligations

Who cares who the UBO is?

1. **Everybody** should care about the (ultimate) stakeholders of an entity with whom a (business) relationship is established.
2. Investigating the identity of the UBO can **protect** from being involved with business partners that conceal illegal activities such money laundering, bribery and corruption, insider dealings, tax fraud, terrorist financing and other illegal activities behind a complex ownership structure.

Who cares who the UBO is?

We distinguish two groups of interested parties:

1. **Private companies/businesses** such as banks, creditors, and cooperation partners

They only have access to public registers and otherwise must request the information. Consulting professionals such as lawyers, tax advisors, business consultants, etc. are even required by law to determine the UBO before accepting an assignment.

2. **State organizations** such as tax offices, police, public prosecutors, intelligence agencies

Access to all registered data, public or not. If data is not directly accessible, e.g., if the registrar is domiciled in another jurisdiction, they must ask the local authorities for disclosure.

Not every UBO wants to be identified

Some UBOs do not want to be identifiable.

1. Criminals, for example, deliberately make use of the opacity of company forms to hide their identity and the real purpose of the organization.
2. The reason for this may simply be old-fashioned tax evasion, but it may also be to prevent the authorities from detecting crime, such as money laundering or bribery and corruption.
3. Or even worse, it could be a cover for terrorist activities.

Legitimate reasons of not being identifiable as UBO

Some UBOs, however, have a legitimate interest of not being identifiable.

1. Real Estate

In most countries, real estate registries show the names of the owners of properties. In some cases, a beneficial owner may not want their name to appear on public records. In such cases, it is common for trustees or other entities to act as legal owners in place of the beneficial owner.

For example, famous persons may not want their home address to be easily found in public records, so they do not appear personally on title deeds. Others intend to circumvent restrictions for e.g. foreign ownership.

Legitimate reasons of not being identifiable as UBO

2. Asset Protection

Wealthy individuals who are at risk of lawsuits, or simply want to protect their assets and plan their estate, generally use trusts or similar structures to act as the legal owner of their property, often securities and money, while they and their families continue to be the beneficial owners.

Here again, this practice is generally legal but is in any case highly regulated.

Legitimate reasons of not being identifiable as UBO

3. Restrictions on Business Activities

Business activities are often restricted in numerous ways. In the UAE, for example, companies doing business “onshore” had to have (and still have in some areas) a UAE national as majority shareholder.

Investors and advisors attempt(ed) to prevent or circumvent this mandatory requirement by entering into contracts whereby the management, ownership, profit entitlement and control vested exclusively with the non-UAE or foreign national, basically making the local a sole nominee shareholder. This practice was and is accepted to a certain degree, but has limitations (e.g. Anti-Fronting Law).

How to avoid being identifiable as UBO

Three main options:

1. **Concealing the true UBO** through complex international corporate structure with holdings in offshore jurisdictions that do not maintain UBO registers and/or do not disclose such information.

The still existing confusion over some aspects of UBO definitions, a lack of accurate ownership registers and other aspects make it factually still relatively easy to conceal the UBO.

However, under the applicable compliance legislations this practice will often not be legal and may lead to administrative penalties, de-registration of companies, and in particular will make it very difficult, if not impossible to open bank accounts.

How to avoid being identifiable as UBO

2. Trusts and Foundations

Trusts and Foundations are two of the hardest types of vehicles to validate true beneficial ownership.

Who is the UBO depends on the question who “owns”, benefits from and actually controls the trust/foundation.

These aspects differ depending on the type of trust/foundation, the country where it is created, and the guidelines within the actual trust document itself.

If the trust/foundation is **irrevocable**, the original owner of the assets (founder or trustor) can cease to be the UBO. The UBOs are then the beneficiaries and/or the persons who control the entity.

How to avoid being identifiable as UBO

3. Giving up Ownership in the Shares

A third, and other legal option is to really give up the beneficial ownership while retaining the option to re-acquire control.

Example:

A company with a 51% foreign shareholder legally operates in a country that favours local-owned businesses in legal tenders.

The majority shareholder may transfer full (i.e. legal and beneficial) ownership in such company to a trusted person. This person therefore becomes the “UBO” and is lawfully disclosed to the authorities.

How to avoid being identifiable as UBO

3. Giving up Ownership in the Shares

It is ensured, that the UBO position really transfers to the new shareholder/UBO, while the interests of the former UBO are protected:

- Shares are sold to new UBO for a purchase price X.
- Purchase price will not immediately be paid by new UBO. Instead, he/she receives a loan from the former UBO as seller for the full amount (e.g. EBITDA multiple of 6 plus 10% interest).
- The loan principal plus interest is repaid from the dividends received by the UBO. If the loan cannot be repaid or in any other event of default, share ownership can/has to be re-transferred and the UBO is released from its obligations under the loan agreement.

How to avoid being identifiable as UBO

3. Giving up Ownership in the Shares

- As additional security, a pledge & option agreement is concluded. The former UBO will have an option to buy back the shares for an amount X at any time.
- Finally, other involved persons such as registered agents receive instructions by both parties to secure that the agreement is not circumvented.
- Additionally, the new UBO could issue a will, in which old UBO is heir of the shares in case of death of the new UBO.

These structures can be legal but in any case the utmost care has to be taken that it would not be considered a circumvention of applicable laws.

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