

Article

The impacts of the beneficial owner register on Hungarian asset management foundations, trusts, and hybrid trusts

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Abstract

The European Union beneficial ownership register regime forces, among others, companies, trusts, and foundations to make publicly available their beneficial owners, even though the definition of a beneficial owner is foreign to many continental jurisdictions due to the Roman law heritage of civil law. This article discusses the functioning of the Beneficial Ownership Register in Hungary with a special focus on the Hungarian asset management foundation, the trust, and the hybrid trust. It also analyzes the impact of the Beneficial Ownership Register and Anti-Money Laundering laws on the privacy of the participants in an asset management foundation, trust, or hybrid trust.

Introduction

European Union (EU) Member States were required to implement the new rules on the Beneficial Ownership Register (BOR), provided for by the 5th amendment to the Anti-Money Laundering (AML) Directive,¹ into national law by 10 January 2020. Many of the Member States, including Hungary, did not consider the rationale² behind the Directive important enough to speed up its implementation.³ Ultimately, the Hungarian Parliament has implemented the 5th AML Directive by adopting Act XLIII of 2021 (BOR Act).⁴ In compliance with the AML Directive the BOR Act has created a legal basis which, once the BOR becomes fully effective,⁵ will make the beneficial ownership (BO) information of the companies and foundations affected by the Act publicly available. Although the BOR Act does not directly list the asset management foundation (AMF) as falling

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1. DIRECTIVE (EU) 2018/843 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

2. The rationale behind the Directive, among others, is to combat money laundering and to ensure fair taxation of every type of income.

3. 17 Member States missed the deadline.

4. The Act is currently not available in English. The original Hungarian version is available here: <https://net.jogtar.hu/jogszabaly?docid=A2100043.TV>, last visited: 23 January 2022.

5. The BOR system will become operative in several stages until the 1st of July 2022.

within the scope of the act, it does mention the foundation.⁶ The author's interpretation is that the AMF is a special type of foundation; therefore, the AMF falls within the scope of the BOR Act, and the beneficial owners (BOs) of the AMF shall be publicly available, in the same way as are the BOs of companies.

In the case of a request for information on trusts or trust-like legal arrangements,⁷ the applicant must first prove and document the purpose of the intended use in accordance with the BOR Act and the existence of a legitimate interest. This means that the beneficial owners in the case of a trust, may enjoy a certain degree of privacy, albeit limited. The authorized authorities,⁸ have full access to information on the beneficial owners of trusts and no longer have to obtain it from the trustee or the National Bank of Hungary, as was the case before the introduction of the BOR. However, prior to the BOR, authorities were already provided with full transparency on the beneficial ownership of trusts from the first day of the trust's introduction into the Hungarian legal system. The new rules merely provide faster access to the information.

The hybrid trust,⁹ a trust without a settlor, as the founder of an AMF transfers assets into the trust by unilateral declaration and is given the right to transfer the founder's rights to the board of the AFM, shares the AML classification and BOR treatment of the foundation: This is because the trust assets are part of the AMF's assets and the sole beneficiary of the hybrid trust must be the same AMF that also acts as trustee.¹⁰ Therefore, the information on the BOs of the hybrid trust is publicly available to the extent and classification that are required by the AML Act¹¹ and the BOR Act.

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The general aim and application scope of the BOR Act

The aims of the BOR Act are, in accordance with the AML Directive, the creation of the BOR data background service, the provision of ownership transparency of economic and social actors, and the combat of money laundering and terrorism financing.

The BOR Act divides the personal scope of application of the law into two parts, the first for data-providers and the second for service-providers. Entities that fall into either category must comply with the BOR Act; Data-providers who fall under the personal scope of application of the BOR Act, shall maintain accurate, up-to-date information about their BOs and transmit the required BO information to the financial institutions where the respective data-provider maintains its payment accounts.

The category of data-providers includes, among others, all types of companies available in Hungary including the Societas Europaea (SE), cooperatives, associations, foundations and the trustees of trusts or trust like relationships, if the trustee provides its services in Hungary, establishes a business relationship in Hungary, or acquires real estate in Hungary. Although, the BOR Act tries to focus on trust relationships and their BOs, it ends up classifying the trustee as a data-provider. This classification may cause confusion in the BO data when

6. Article 1, paragraph 1, sub-paragraph 27 of the BOR Act.

7. There were disputes whether the Hungarian fiduciary asset management (FAM) contract is a trust or not. See in detail: Á Menyhei, "Development of the estate planning industry through the introduction of the trust in Hungary", 22(6) *Trusts & Trustees* (2016) 659–664, CE Rounds, Jr and I Illés, "Is a Hungarian Trust a Clone of the Anglo-American Trust, or Just a Type of Contract?: Parsing the Asset-management Provisions of the New Hungarian Civil Code" 6 (2) *Journal of International Commercial Law* (2015) 153, http://www.georgemasonjicl.org/wp-content/uploads/2015/08/6_Geo_Mason_J_Intl_Com_L_153_2015-3.pdf#page1/454, accessed 3 February 2016.

The author believes that the practice has skipped this theoretical debate and recognized the FAM contract as a trust. Therefore, the word "trust" is used for the FAM contract.

8. These are: any authority in order to perform its statutory tasks, prosecutor's office, court and any supervisory authority.

9. See in detail Á Menyhei and J Zsoldos, "Privacy protection in Hungary", 26 (6) *Trusts & Trustees* (2020) 542–549.

10. See in detail Á Menyhei, "The new Hungarian asset management foundation", 25(6) *Trusts & Trustees* (2019) 599–610, at 599.

11. Act LIII of 2017 on the Prevention and Combating of Money Laundering and Terrorist Financing, available in English at <https://net.jogtar.hu/jogszabaly?docid=a1700053.tv&dbnum=628&getdoc=1> Last visited 23. January 2022.

See for a detailed analysis about the classification of the BOs of the AMF and the hybrid trust: Á Menyhei and J Zsoldos, note 8.

the financial institutions transmit BO data to the tax authority. This issue will be analyzed later when explaining the functioning mechanism of the BOR.

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The role of service providers is more technical in nature when it comes to transmitting data to the BOR. Service-providers either collect BO data from the data-providers and transmit the information to the BOR or use the BOR for their extended KYC and compliance procedures.

The BOR Act defines the service-provider with a reference to the AML Act¹² which provides an extensive list of those service providers who deal with the assets of clients. The list includes, among others, the financial institutions, financial service providers, pension fund providers, post-payment service providers, casinos, accountants, auditors, tax advisors, attorneys, trustees, real estate agents, auction houses, traders of precious metals, escrow service providers, virtual currency service providers, and company address providers. Among these service-providers, the BOR Act imposes obligations and tasks on financial institutions, as they have the obligation to collect the BO data from the data-providers in connection with their payment accounts and to transmit the information to the BOR. The other service providers shall use the BOR for their extended KYC and compliance procedures as explained later in this article.

Although the list of entities covered by the scope of the BOR Act¹³ is very extensive, the BOR Act does not

apply to investment funds including private equity funds established in Hungary.

Investment funds are regulated in Hungary in accordance with the two main pillars of EU legislation in this area, which are the Directive on Undertakings for Collective Investment in Transferable Securities (UCITS)¹⁴ and the Alternative Investment Fund Managers Directive (AIFMD).¹⁵ The Act CXCVI of 2011 on investment fund managers and collective investment vehicles (IMF Act)¹⁶ and the Act XVI of 2014 on the collective investment vehicles and their managers¹⁷ regulate the undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIF) and their managers. According to the Acts, the collective investment fund and the alternative investment fund, including the private equity fund, are legal persons.¹⁸ For historical reasons, investment funds are not established in the form of a company. They do not issue shares or quotas, are not registered in the company registry and, most importantly, are subject to completely different rules than companies. In most EU Member States investment funds take the form of certain types of companies and therefore, automatically fall under the BOR rules. In contrast to these EU Member States, the investment funds in Hungary do not exist in the form of companies and thus do not fall under the scope of application of the BOR Act. This results in the unique outcome that, while investment funds fall under local BOR legislation as companies in the vast majority of the EU Member States, they are not covered by the BOR legislation in Hungary as they are not companies and do not fall within the scope of application of the BOR Act. This results in investment funds, including real estate funds, venture capital funds and, most importantly, private equity funds preserving the privacy of their beneficial owners, as their data is not publicly available in Hungary.

12. Article 3, Sub-Paragraph 12 of the BOR Act.

13. BOR Act. Article 1, Paragraph 1., Sub-paragraph 1-29.

14. DIRECTIVE 2009/65/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

15. Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.

16. <https://mkogy.jogtar.hu/jogszabaly?docid=a1100193.TV>, last visited 23. January 2022.

17. <https://net.jogtar.hu/jogszabaly?docid=a1400016.tv>, last visited 23. January 2022.

18. Article 65. Paragraph 1 of Act XVI. of 2014. about the collective investment vehicles and their managers.

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Who are the BOs of companies, asset management foundations, trusts, hybrid trusts, and investment funds?

To understand the functioning and scope of the BOR, the definition of the BO must first be clear. The definition of a BO is a very technical one, created solely from an AML perspective, and does not fully cover the definition of a civil law owner. For example, from a civil law perspective, a trustee is the absolute owner of the asset, but from an AML perspective there can be different BOs in respect of this very same asset owned by the trustee.

A ten percent owner of a company participation is an absolute owner from a civil law perspective, but not a BO from an AML perspective. A twenty-five percent owner of a company participation is a civil law owner and a BO of the participation, but not a BO if the company is listed on a recognized stock exchange.

The BOR Act itself does not provide a definition of the BO of the data-provider, it instead refers back to the AML Act.¹⁹ Therefore, the BO of the data-provider must be determined in accordance with the AML Act.²⁰

First, it should be highlighted that an investment fund, since it is not classified as a data-provider, does not fall under the definition of a BO as provided for by the BOR Act, as the act limits the definition of BOs to data-providers only. Therefore, the AML Act's definition of a BO is irrelevant when it comes to investment funds; consequently, the BOR does not cover the BO data of investment funds. The fact that a private equity

fund can even be established for an individual provides a vast opportunity for privacy protection.

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The AML Act defines the beneficial owners of a legal entity, a foundation, including the AMF, as well as of a trust as follows:

“Beneficial owner” shall mean:

- a) any natural person who owns or controls at least twenty-five per cent of the shares or voting rights in a legal person or an unincorporated organization directly or - by way of the means defined in Subsection (4) of Section 8:2 of Act V of 2013 on the Civil Code (hereinafter referred to as “Civil Code”) - indirectly, or who is able to exercise effective control over the legal person or unincorporated organization via other means, if that legal person or unincorporated organization is not listed on a regulated market and is subject to disclosure requirements consistent with (European) Community legislation or subject to equivalent international standards,*
- b) any natural person who has a dominant influence in a legal person or unincorporated business association as defined in Subsection (2) of Section 8:2 of the Civil Code,*
- d) in the case of foundations:*
 - da) where the future beneficiaries have already been determined, (the beneficial owner is) the natural person who is the beneficiary of twenty-five per cent or more of the property of the foundation,*
 - db) where the individuals that benefit from the foundation have yet to be determined, (the beneficial owner is) the natural person in whose main interest the foundation is set up or operates, or*

19. Article 3, Sub-Paragraph 13 of the BOR Act.

20. Article 3, Sub-paragraph 38, a and b and d-f points of the AML Act.

dc) (the beneficial owner is) the natural person who exercises control over the management of the foundation or exercises control over at least twenty-five per cent of the property of a foundation, and/or who is authorized to represent the foundation,

e) in the case of fiduciary asset management contracts: (the beneficial owner is)

ea) the principal, and the beneficial owner referred to in Paragraph a) or b),

eb) the fiduciary, and the beneficial owner referred to in Paragraph a) or b),

ec) the beneficiaries or class of beneficiaries, and the beneficial owner referred to in Paragraph a) or b), furthermore

ed) any natural person exercising effective control over the trust fund via other means, and furthermore

ef) in the absence of the natural person referred to in Paragraphs a) and b), (the beneficial owner is) the executive officer of the legal person or unincorporated business association;”

As companies are legal persons, their BOs shall be determined according to paragraph a) above; therefore, if there is a private individual who directly or indirectly owns or controls at least 25% of the shares or voting rights that individual is considered the BO. If there is no private individual holding at least a twenty five percent direct or indirect ownership interest, voting rights or control in the company, the ultimate rule to determine the BO in such case is that the manager(s) of the company shall be regarded as BO of the company.

With regard to provision d) above, it is obvious that the AMF falls under the AML Act just as any other foundation. Consequently, if a designated beneficiary holds an ownership interest of at least 25% in the AMF, or if there is an individual in whose main interest the foundation was set up or operates, who holds powers or who exercises control over the management or the board of the AMF, this person is considered to be the beneficial owner of the AMF. The same applies if a person exercises control over an ownership interest of at least 25% in the AMF.

However, even an AMF may provide enhanced privacy for the beneficiaries if the board of the AMF has discretionary power to appoint future beneficiaries, and if at the same time there is no individual who is actually appointed for an ownership interest of at least 25% in the AMF's assets. In addition, there must not be any person, for example a protector, who exercises control over the management of the foundation. If these conditions are met, it is the AMF's board that is regarded as the BO of the AMF.

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Determining the BOs of trust relationships is quite straightforward; the settlor, the trustee, the beneficiary, and the protector if the protector exercises control over the trust assets shall be considered as beneficial owners of a trust. However, in the case of hybrid structures when an AMF acts as trustee of a trust relationship, the classification deviates from these general rules as will be explained in the following part.

Beneficial ownership in the case of a hybrid trust (trust relationship provided by an AMF)

The ownership structure²¹ in a foundation, although its aims are very similar to those of a trust relationship, differs from a trust. Consequently, the different ownership structure affects the determination of the beneficial ownership of such a structure. It is for this very reason that the AMF Act uses a different terminology than the Trustees Act²² and the trust section of the Civil Code.²³

21. This paragraph is based on the article of Á Menyhei and J Zsoldos, note 8. Please refer to the article for the full argument.

22. Act XV. of 2014 on the trustees and their activities.

23. Act V. of 2013 on the Civil Code.

According to the AMF Act, there is no settlor in the case of a trust relationship that is managed by an AMF, as Article 2(4) of the AMF Act provides that “*the founder may transfer assets into fiduciary asset management by unilateral declaration made in the deed of foundation*”. Moreover, Article 5 (1) of the AMF Act provides that “*the founder of an asset management foundation may empower (. . .) the foundation board to exercise the founder’s rights*”. These provisions allow the founder to transfer the founder’s rights to the foundation board. If such a transfer is made, it results in the cancellation (cessation) of the founder’s position. The AMF, as a legal person, only comes into existence by court order. Consequently, a trust relationship managed by an AMF cannot be established earlier than the AMF itself. Therefore, if the founder transfers his founder’s rights to the board of the AMF in the foundation deed, the board of the AMF at the time of the creation of the trust relationship becomes the founder of the trust relationship. Once the founder has transferred his rights to the foundation board, the board members qualify as beneficial owners of the trust relationship instead of the economic founder who contributes assets to the trust.

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Moreover, the AMF Act contains a legal presumption with respect to the beneficiary. Article 2(3)(a) of the AMF Act provides that “*in respect of the assets taken into fiduciary asset management by the asset management foundation (. . .) the asset management foundation shall be deemed the sole beneficiary*” of the trust relationship. This means that the beneficiary of the trust managed by an AMF is the AMF itself. However, the beneficiary of the AMF itself may be any person appointed by the founder or co-founder. If no beneficiary holds an interest of at least 25% in the assets of the AMF or no person exercises effective control over the assets of the AMF,

the board members remain the beneficial owners of the AMF.

Functioning of the BOR

The functioning of the Hungarian BOR is as follows. The data-provider falling within the personal scope of application of the BOR Act, shall maintain accurate, up-to-date information about its BOs and transmit the required BO information to the financial institutions where the data-provider maintains its payment accounts. In the event of a change in the BO information the data-provider must receive the new information about the change from the BO within 15 days; however, the responsibility for the fulfillment of this obligation rests with the data-provider. This in return places significant responsibility on the management of data-providers. Obviously, data-providers must determine the BOs in accordance with the AML Act. Financial institutions, in accordance with their know your client (KYC) and compliance obligations under the AML Act, must collect and maintain accurate, up-to-date BO information on those data-providers with whom they maintain a business relationship and transmit the BO data to the BOR by the 5th day of every month. The National Tax and Custom Office (tax authority) is responsible for maintaining and managing the BOR; therefore, the financial institutions, shall transmit the information to the BOR through a closed electronic transmission channel between them and the tax authority. The tax authority assigns an individual national registration number (BOR number) to each data-provider as well as allocates ten BO index points to each of them. The BO Index points reflect the level of compliance of the data-providers.

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As mentioned earlier, the trustees and not the trust relationships are classified as data-providers and the obligation of data-providers is to maintain accurate, up-to-date information about their BOs. A

technical, literal interpretation of these rules would result in trustees having to provide their own BO information rather than the BO information of the trust relationships. This is obviously the opposite of the general objective of the AML Directive and the BOR Act. The general aim of these legislations is that trustees shall provide BO information on trust relationships. The wrong classification however triggers an additional technical issue during the implementation process. Financial institutions are not able to separately transmit BO information of those fiduciary relationships that are managed by the same fiduciary. The trustee is the data provider, and under the correct interpretation of the BOR Act, the trustee must maintain accurate, up-to-date BO information on the trust relationships. Even if the trustee provides the BO information of the different trust relationships separately to the financial institution, the financial institution cannot process it on a trust-by-trust basis, but only in connection with the same trustee, since the trustee is the data provider. In addition, the tax authority assigns a national registration number to each data-provider. Again, the same technical problem arises since the trustee is the data provider. Therefore, under one national registration number there may be several thousand BOs and their information mixed, as it is not separated on a trust by trust basis. The system works when the trustee manages only one trust, but fails when the trustee manages multiple trusts.

Any authority, prosecution office and court may inform the tax authority if they find a discrepancy between the BO data in the BOR and the known facts. The service providers shall monitor the BO data as part of their compliance activities and notify the tax authority if they find discrepancies between the facts and the BO data registered in the BOR. The tax authority deducts 2 points from the BO index of the data-provider if the discrepancy was reported by a state body and 1 point from the BO index of the

data-provider if the discrepancy was reported by a service provider. The tax authority corrects the BO data of the data-provider in the BOR in accordance with the above notifications simultaneously with the change in the BO index of the data-provider.

A BO index of eight to ten points indicates “excellent” compliance, a BO index of less than eight points corresponds to “uncertain” compliance and a BO index of less than six points indicates “unreliable” compliance by the data-provider. The classification of a data provider as “unreliable” is immediately published on the tax authority’s website: if a data provider’s classification remains “unreliable” for more than 180 days, the tax authority publishes it on its website after this grace period. The service providers must use this information in the extended KYC and compliance process before establishing a business relationship with a data-provider. Although the data-providers have the chance to correct the BO information upon the request of the tax authority and gain back their original BO index number, the consequences of non-compliance by those data-providers who were classified as “uncertain” or “unreliable” are foreseeable. According to the AML Act, the service providers must first perform extended due diligence as well as refuse the fulfillment of any transaction above HUF 4.500.000.²⁴ In case of continued non-compliance, the service provider must terminate the business relationship with the data provider.

Content of the BOR

The BOR contains the following data of data-providers:

- national registration, company registration and tax numbers, name, address, EU individual identification number, if any,
- Regarding the BO of the data-provider: full name, full birth name, citizenship, place, and date of birth,

24. It is approximately €12,000.

address, type, and share size of ownership interest in the data-provider
- BO index of the BO information

Access to BO data

Depending on the status of the applicant, access to BO information is available as follows.

Any authority, the prosecutor office, and the court shall have free, immediate and online access to the BO information during the performance of their duties, without informing the data provider about the information request.

Any authority, the prosecutor office, and the court, may during the performance of its tasks, transfer the BO information to an authority, the prosecutor's office or the court of an EU Member State or to a third country if, in the latter case, the third country's data processing complies with the conditions of the regulation of transmitting data to a third country.

Service providers, in fulfilling their compliance duties, have free access to BO information in the way determined by the tax authority, with the exception of the BO index and the deviation reports provided by the authorities, the prosecutor office, the court, or other service providers.

Service providers, in fulfilling their compliance duties, have free access to BO information in the way determined by the tax authority, with the exception of the BO index and the deviation reports provided by the authorities, the prosecutor office, the court, or other service providers

The data-provider and the BO may request from the tax authority a free, individual data service on their BO information and the deviation reports provided by the authorities, the prosecutor office, the court or other service providers.

A third party may, against the payment of a fee, request individual data service on the BO information of any data-provider, excluding trust relationships, if the third party provides the name of the data-provider. Excluded from the information provided to the third party are the discrepancy reports of authorities, the prosecutor's office, the court or service providers.

A third party may, against the payment of a fee, request individual data service on the BO information of any data-provider, excluding trust relationships, if the third party provides the name of the data-provider

A third party may against the payment of a fee request individual data on the BO information of a trust relationship if the third party states and documents the purpose of its data use and its legitimate interest in obtaining the data. Legitimate interests are combating money laundering or terrorist financing, the fact that the third party obtaining the data and any BO of the trust relationship are family members as defined in the Civil Code,²⁵ that the third party obtaining the data and any BO of the trust relationship are both BOs of the same legal entity, and that above individuals are in a close business relationship or property lawsuit.

The third party must obtain prior approval of the competent minister before submitting the data request to the tax authority

In addition, if the trust assets include assets held by a legal entity or other entity registered in a third country outside the EU and the assets give rise to a controlling influence over said entity, the third party may request data on the BO of the trust relationship in writing. The third party must obtain prior approval of the competent minister before submitting the data request to the tax authority. During the preliminary permission process, the third party must state and document the purpose

25. Article 8:1 paragraph 1 sub-paragraph 2 of the Act V of 2013 on the Civil Code.

of the data use and the legitimate interest in obtaining the data or the qualifying majority influence in a third country entity. The BO information which may be provided to the third party in the above cases excludes the discrepancy reports provided by the authorities, the prosecutor office, the court, or service providers.

Summary

Another piece of privacy has been lost forever with the implementation of the BOR. Nonetheless, the

special BO classification rules for hybrid trusts and investment funds, especially private equity funds which do not fall under the BOR regime, provide extra shelters for those who seek privacy. Trust relationships enjoy special treatment and only those who can legitimately justify and document their narrowly defined legal interest may have access to the BO information. The two-stage data request process of BO information of trusts is likely to efficiently filter the data fishing expeditions and the privacy of trust beneficiaries will remain intact.

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