RocaJunyent Informs

Anti-Money Laundering Department
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Creation of the Central Registry of Beneficial Ownership and approval of its Operating Regulations: new corporate obligations

On 19 September, Royal Decree 609/2023, of 11 July, published on 12 July 2023 (hereinafter “the Royal Decree”), which created the **Central Registry of Beneficial Ownership (hereinafter “CRBO”) and approved its operating regulations**, entered into force in general terms.

The object of the Royal Decree is to implement the provisions of the third and fourth additional provisions of Law 10/2010, of 28 April, on Anti-Money Laundering and Countering the Financing of Terrorism (hereinafter “AML/CFT”), which is necessary to complete the transposition of the Fifth Anti-Money Laundering Directive of the European Parliament and of the Council.

The purpose of the CRBO is to centralise, in a purely electronic form, beneficial ownership information currently available from various sources, in addition to that provided directly to it by those obliged to report (hereinafter, the “obligors”), and to publicise it in order to protect the integrity of the financial system and other sectors of economic activity through the prevention of money laundering and terrorist financing. At the same time, it aims to ensure the interconnection of beneficial ownership information at a European level.

In order to centralise existing information, the CRBO will collect data registered in official Spanish sources such as the Registers of Foundations, Associations, Cooperatives, Agricultural Transformation Companies, the Association of Real Estate Property, Mercantile and Movable Property Registrars of Spain (through the Commercial Registers) or the General Council of Notaries, among other registers with competence in the collection of beneficial ownership data.

With regard to the information provided directly, although to date Spanish companies were already obliged to provide their beneficial ownership when filing their annual accounts, this new regulation brings some new obligations of particular importance which, if not complied with, may entail penalties.

A brief reminder of the concept of beneficial ownership

The concept of beneficial ownership to be taken into consideration in order to recognise on whom information should be provided to the CRBO is regulated in Articles 4, 4a and 4b of the AML/CFT, and is generally as follows:

- The natural person(s) who ultimately own(s) or control(s), directly or indirectly, more than 25% of the share capital or voting rights of a legal person, or otherwise exercise(s) control, directly or indirectly, over a legal person (beneficial ownership by ownership or control).

- Where there is no natural person who owns or controls, directly or indirectly, more than 25% of the share capital or voting rights of the legal person, or otherwise exercises control, directly or indirectly, over the legal person, such control shall be deemed to be exercised by the director(s). Where the director appointed is a legal person, control shall be deemed to be exercised by the natural person appointed by the director legal person (deemed to be the beneficial owner).

This is subject to the different specificities foreseen according to the type of entity (commercial companies, foundations, associations, unincorporated entities, trusts, etc.). For example, in the case of trusts or other legal arrangements similar to trusts, the identity of settlors, trustees, protectors, beneficiaries and any other natural person who ultimately exercises control over the trust, through direct or indirect ownership or by other means, must be disclosed, as they are all considered to be beneficial owners. In the case of foundations and civil associations, the members of the Board of Trustees for the former and the members of the representative body or Board of Directors for the latter will generally be considered as beneficial owners.

Who must declare their beneficial ownership information in this Registry?

The following entities are obliged to report on their beneficial owners:

- **All Spanish legal entities[1]:** commercial companies, civil companies with legal personality, foundations, associations, non-profit entities, and all other Spanish legal entities.

- **Entities or structures without legal personality which:**

[1] Although the Royal Decree does not mention it, it is understood that companies listed on a regulated market and subject to disclosure requirements in accordance with EU law or equivalent international standards that ensure adequate transparency of ownership information, such as those regulated by the CNMV in Spain, BAFIN in Germany, SEC in the United States, among many others belonging to the EU or to countries considered equivalent third countries due to their similar anti-money laundering regulations, should be exempt from the EU Directives.

- **Have their effective headquarters or their principal activity in Spain, or are administered or managed by natural or legal persons resident or established in Spain**.

or

- Unincorporated entities or structures such as **trusts and unincorporated entities or structures analogous to *trusts*** which, not being managed or administered from Spain or another European Union State, and not being registered by another European Union State, **intend to establish business relations, carry out occasional operations or acquire real estate in Spain**, and must declare the required information by electronic means to the CRBO before commencing such operations.

The responsibility for the declaration of beneficial ownership of commercial companies will fall upon the management bodies of each entity through the submission of the declaration of beneficial ownership in the annual accounts, as is currently done. In addition, the Directorate General for Legal Certainty and Public Faith may approve a new model form for the declaration of the beneficial ownership.

The same liability would seem to apply to the management bodies of all other Spanish legal persons, although the Royal Decree does not specify this.

In the case of trusts, the trustee and manager of the trust and, failing that, the settlor, and finally, the beneficiaries, are responsible for making the declaration. In the case of funds, this obligation falls on the fund management company.

What information must be declared on the beneficial ownership?

The beneficial owner data to be declared are:

a) Name.

b) Surname.

(c) Date of birth.

d) Type and number of identification document (in the case of Spanish nationals or residents in Spain, the document issued in Spain shall always be included).

e) Country of issue of the identification document, if the National Identity Document or Spanish Resident Card is not used.

f) Country of residence.

(g) Nationality.

(h) Criterion qualifying that person as a beneficial owner.

(i) In the case of beneficial ownership by direct or indirect ownership of shares or voting rights, shareholding percentage, including, in the case of indirect ownership, information on the legal persons involved and their interest in each of them (not applicable to trusts and similar legal arrangements).

j) A valid e-mail address, for the purpose of sending possible notifications by electronic means.

It can thus be seen that all the data required are those that must currently be provided when filing annual accounts for commercial companies obliged to do so, with the addition that these data must now be kept up to date and that the obligation to provide an e-mail address of the beneficial owners has been added, so that the CRBO can inform them of the data that are registered.

Since until the entry into force of the Royal Decree there was no obligation to provide this e-mail address, commercial companies will have to complete this missing information. It is not clear from the Royal Decree whether this information to be completed will be requested by the Commercial Register from the obligor, but at least when the obligor notifies a change of beneficial owner, or in any case in the annual declaration in January, which will be discussed later, the missing information can be completed either at the Commercial Register or the CRBO.

Since the entry into force of the Royal Decree, there are also new entities obliged to report on beneficial owners.

In addition, with regard to the reporting party itself, it must provide the identification data considered necessary by the Registry, in particular: the company name or, in the case of an entity or structure without legal personality, its name; EUID (European Unique Identifier), Tax Identification Number, or, failing that, the entity's registration number; legal form of the entity; nationality; and registered office, and/or supporting documentation.

What deadlines are set and where should the information be submitted? Some contradictions detected

- Declaration of annual accounts of commercial companies

  Deadline: one month after approval —according to the Capital Companies Act.

  Where: Commercial Register

The filing of annual accounts including the form for identification of the beneficial owner should be carried out as at present, following the deadlines established in the Capital Companies Act and adjusting their format to Order JUS/616/2022, of 30 June, which approves the new models for the filing of the annual accounts of those obliged to publish them with the Commercial Register.

- Changes of beneficial ownership in commercial companies:

  Deadline:10 days from the day after becoming aware of the change.

  Where: Commercial Register

The Royal Decree adds that in the event of changes in the beneficial ownership, companies must report such changes to the Commercial Register within 10 days of becoming aware of the change.

- Transfer of data between the Central Register of Real Estate Property and the different registers of legal persons:

Time limit: 9 months from the day after publication

Where: CRBO

The Royal Decree establishes that the Ministry of Justice will incorporate into the CRBO the obligors' data held in other registers and databases (Registers of Foundations, Associations, Cooperatives, Commercial Registers, etc.), granting for this purpose a maximum period of nine months from the day following publication of the Royal Decree (13 July 2023 —ending, therefore, on 13 April 2024), a maximum period of **nine months** from the day following the publication of the Royal Decree (13 July 2023 —the period therefore ending on 13 April 2024), and from the first transfer, daily updates of the entries and variations that have occurred will be obligatory.

- Supplementary declaration to the data in registers:

  Deadline: two months from the entry into force of the Royal Decree.

  Where: CRBO

At the same time, in the event **that** the data on beneficial ownership provided by the different registers are not all those stipulated in the Regulations of the Royal Decree, the obligors must complete them electronically at the CRBO within **two months** of the entry into force of the Royal Decree (19 September 2023) by means of a **supplementary declaration.**

As can be seen, it is difficult to understand how it will be possible to know, before the two-month deadline for compliance (and not the nine-month deadline), whether the information previously provided to the registers with regard to data on beneficial owners was complete and compliant with the Royal Decree, or whether, on the contrary, it needs to be supplemented. In other words, an entity with legal personality that is aware of the information contained in any of those registers will know this clearly, as will anyone who has not provided the information on beneficial owners to any register or database, but what about those that do not have exact knowledge of whether all the necessary information is available? Should they wait for the 9 months to expire, and to receive a possible request from the CRBO to complete the information, or will they have failed to comply because the two months have been exceeded? In any case, it seems prudent, until this is clarified, for those who have provided the information to their corresponding Registry, but do not know whether the information provided was complete and in accordance with the Royal Decree, to provide the information required by the CRBO within the **two-month period**.

What is clear in the regulations is that, once the CRBO has been provided —within a period of 9 months— with the data contained in the different registers, if discrepancies or contradictions are found to exist between the data provided, the CRBO will inform the said registry, which must inform the party obliged to declare its beneficial ownership of this fact and request it to ratify the data contained therein or make a new declaration of beneficial ownership within a period of ten days.

- Reporting entities that have not declared their beneficial ownership in any competent registry:

  Deadline: 1 month from its incorporation, and in the case of trust or similar entities, 1 month from having the obligation, and 10 days to report changes.

2 months trusts or similar existing trusts.

Where: CRBO

Another important deadline established is for all obligors that have not declared their beneficial ownership through the Commercial Register in their annual accounts, or the Registers of Foundations, Associations, Cooperatives or others where they are registered, who must declare the information on their beneficial ownership to the CRBO by electronic means, within a maximum period of **one month** from their incorporation. Curiously, the regulations do not clarify the time limit for obliged parties (other than trusts or similar types of entities) which, although they already exist, have not declared their beneficial ownership in any register. It seems prudent that, in the absence of any specification in this regard in the Royal Decree, the declaration should be made within the same period of one month as for those that are incorporated or, at the most, within the two-month period established for complementary declarations.

With respect to trusts and unincorporated entities or structures analogous to trusts that are set up, a maximum period of **one month** is established from the time they are obliged to identify the beneficial owners, and subsequently also to update the data within a maximum period of **ten days** when there are changes in the beneficial ownership, and with respect to those already existing, a maximum period of **two months** is established from the entry into force of the Royal Decree to make a first declaration to the CRBO.

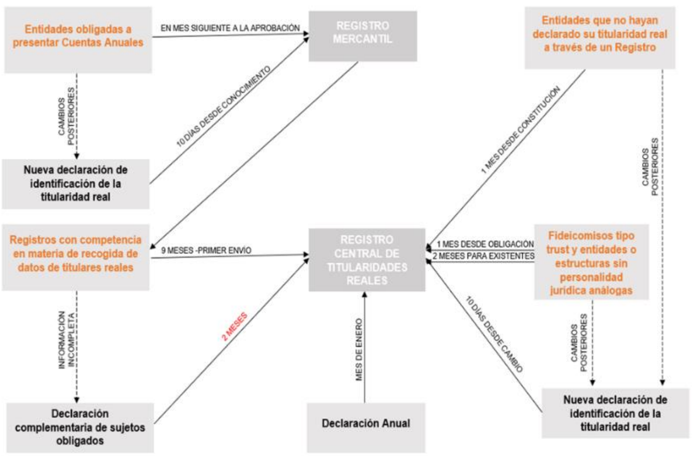
- Annual declaration in all cases:

  Deadline: January

  Where: CRBO or Commercial Register where applicable?

Finally, in all cases, an **annual declaration** must be made **electronically in January**, and in the event that there have been no changes in beneficial ownership, a **declaration confirming this** must be made. It is not established exactly whether this declaration must always be made to the CRBO for all taxpayers, or whether those who file annual accounts can do so at the Commercial Register.

As a graphic outline:



What are the consequences of failing to comply with the obligation to identify and report to the Central Registry of Beneficial Ownership?

Failure to comply with the obligation to identify and inform the Central Registry of Beneficial Ownership shall result in the closure of the registry file as provided for in Article 378 of the Companies Register Regulations, whereby, if one year has elapsed since the end of the financial year without the obligation having been complied with, the Companies Registrar shall not register any document filed after that date.

In addition, Royal Decree-Law 5/2023, of 28 June, has included a new section in the Third Additional Provision of the AML/CFT, which establishes that such a non-compliance constitutes an administrative offence, the seriousness of which will be determined by the Ministry of Justice, which will also establish the possible sanctions, the sanctioning procedure and the competence for the exercise of the sanctioning power. In other words, although there are currently no other regulated sanctions, the AML/CFT empowers the Ministry of Justice to establish the sanctions it deems appropriate.

Who can access the data in this Registry?

- Authorities competent for the prevention, detection, investigation and prosecution of terrorist financing offences, money laundering and its predicate offences, both national and from other Member States of the European Union, shall have access to it free of charge and without any restriction.

- The regulated entities of the AML/CFT shall have access to the current information contained in the Central Registry and shall request electronic certification of the Registry or an extract therefrom for compliance with their obligations with regard to identification of the beneficial owner, for which purpose they shall state the reason for the queries.

- Persons or organisations that can demonstrate a legitimate interest in knowing such data, although they will have access to data on a more limited basis. Legitimate interest in the knowledge of beneficial ownership information shall be presumed to be established in the case of the media or civil society organisations involved in preventing and combating money laundering and terrorist financing.

With the exception of public authorities, notaries and registrars and their centralised prevention bodies, access to information by all other parties subject to the CRBO shall require the prior payment of a fee to cover administrative costs, to be determined by the Ministry of Justice. Until such time as this cost is determined, access shall be free of charge for all those with a legitimate interest.

A brief mention on Personal Data Protection

The Ministry of Justice, through the Directorate General of Legal Security and Public Faith, is the data controller of the CRBO.

Although the natural persons concerned will be informed by electronic means about the data concerning themselves that were reported directly to the CRBO, allowing them to exercise their rights of access, rectification, cancellation, objection, limitation of processing, portability and not to be subject to automated decisions and erasure, their consent will not be required for the processing of their data.

Furthermore, the transfer to third parties of data obtained without indicating the source is prohibited, and the marketing of such data may only be carried out for the purpose of preventing money laundering and the financing of terrorism.

For their part, natural persons who are actual data subjects may request, with the relevant justification, the restriction of access to their data (to persons and organisations with a legitimate interest, but not to public authorities and obliged subjects of the AML/CFT) when they represent a disproportionate risk, or a risk of fraud, kidnapping, extortion, harassment, violence or intimidation, or others of similar seriousness, or when they are a minor or a person with limited capacity or subject to special protection measures. The CRBO must resolve the application within a period of 6 months, and its silence is a rejection. The refusal may be challenged on appeal to the higher hierarchical body, and its decisions shall be the final administrative decision.

In any event, the provisions on the protection of personal data in the AML/CFT, as well as other applicable data protection legislation, must be taken into account.

When shall it come into force?

The entry into force of the Royal Decree was set for 19 September 2023, with two exceptions:

- the transfer of data between the CRBO and the various registers of legal persons entered into force on the day after the publication of the Royal Decree, i.e. on 13 July 2023;

- and access to information relating to the beneficial owner when access is sought by a person or organisation (not government bodies or persons subject to the AML/CFT legislation) that can demonstrate a legitimate interest, which will come into force on 19 October 2023. This last point in turn has another exception, which is the accreditation in the CRBO by the media or civil society organisations related to the prevention and fight against money laundering and terrorist financing of their status as such, for the purposes of the presumption of legitimate interest in access to information. For this group it will also enter into force on 19 October 2023.

The Royal Decree also establishes that, until the first data transfer of the different registers is completed (the deadline for which is 13 April 2024), those authorised to access the CRBO will be able to obtain the information on the beneficial owners by directly accessing the different registers and databases in accordance with their specific regulations.