

DRAFT ROYAL DECREE CREATING THE REGISTER OF BENEFICIAL OWNERSHIP AND APPROVING ITS REGULATIONS PUBLISHED

Royal Decree-law 7/2021, of 27 April, transposing European Union directives in the areas of competition, prevention of money laundering, credit institutions, telecommunications, tax, prevention and repair of environmental damage, posting of workers in the framework of the provision of transnational services, and consumer protection (“**Royal Decree-law 7/2021**”), transposed into Spanish law, among others, Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the “**Fourth Directive**”) and 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 (the “**Fifth Directive**”).

Royal Decree-law 7/2021 amended Law 10/2010 of 28 April 2010 on the prevention of money laundering and terrorist financing (“**Law 10/2010**”) accordingly, although the creation of a single central register for the entire national territory containing information for the identification of beneficial ownership was pending regulatory development.

To these effects, in compliance with the third and fourth additional provisions of Law 10/2010, which were incorporated by virtue of Royal Decree-law 7/2021, the Spanish pre-legislator proposes the following by means of the present draft Royal Decree (the “**Royal Decree**”): (i) to create within the Ministry of Justice the Register of Beneficial Ownership (the “**UBO Register**”), a single central register for the entire national territory, which will contain information to identify the beneficial ownership of legal persons, trusts and other similar legal instruments; and (ii) to approve its Regulations (the “**UBO Register Regulations**”).

1. Target scope

The UBO Register Regulations confine its objective scope to collecting and publicising information to identify the beneficial owner of legal persons, trusts and other similar legal arrangements¹. The information on beneficial ownership will cover the following entities:

- (i) Spanish legal persons and entities or structures without legal personality that have their effective seat of management or their principal activity in Spain, or that are

¹ See Articles 4, 4 *bis* and 4 *ter* of Law 10/2010.

administered or managed by natural or legal persons that are resident or established in Spain.

- (ii) Entities or structures without legal personality which, although not managed or administered from Spain or another Member State of the European Union, and not registered by another Member State of the European Union, intend to establish business relations, carry out occasional operations or acquire real estate located in Spain.

In addition to the information received directly by the UBO Register, the UBO Register Regulations establish that the UBO Register will centralise all the information relating to beneficial ownership that is available in the different public registers in Spain. In this regard, all legal persons, trusts and other entities or structures without legal personality that do not currently have their beneficial ownership declared through public registers, as this means of declaration is not expressly regulated, are obliged to submit the information contained in Articles 4 *bis* and 4 *ter* of Law 10/2010 to the UBO Register, as well as to keep it duly updated.

Lastly, it is worth noting the obligation to declare the information on beneficial ownership annually, in the month of January, with a mere notification being sufficient in the event that there have been no changes in said ownership.

2. Organisation of the UBO Register

The UBO Register will be managed by the Ministry of Justice, with its headquarters in the Directorate General of Legal Security and Public Faith (the “DGSJFP”). The head of the DGSJFP will be in charge of and responsible for the UBO Register.

The UBO Register will operate electronically, 24 hours a day, 365 days a year. Matters requiring human intervention, such as the accreditation of authorities, the qualification of legitimate interest in trusts or similar legal instruments, or the resolution of queries and appeals, will be subject to the office hours of the Ministry of Justice.

A decision of the person in charge of the UBO Register that denies access may be appealed to the General Secretariat for Innovation and Quality of the Public Justice Service (the hierarchically superior body to which the DGSJFP reports), whose decisions will put an end to administrative proceedings.

3. Information to be published in the UBO Register

The data to be provided to the UBO Register varies depending on the person or entity to whom the beneficial ownership data relates.

- (i) Legal persons: the management bodies of the legal person need to provide the following data on the beneficial owner:
- Name and surname(s)
 - Date of Birth
 - Type and number of identification documentation. In the case of legal persons who are Spanish nationals or residents in Spain, the document must always be issued in Spain
 - Country of residence
 - Nationality
 - Criterion that makes the person a beneficial owner
 - In cases where the legal person is the beneficial owner as a result of direct or indirect ownership of shares or voting rights, the percentage shareholding must be indicated, including in cases of indirect ownership, information on the legal persons involved and their participation in each of them
 - Address and e-mail address for notification purposes. In the absence of an e-mail address, the postal address will be used for notifications
- (ii) Trusts and other similar instruments: data should be provided separately by the beneficial owners. In the specific case of trusts, the obligation to report beneficial ownership data to the UBO Register rests with the settlor, failing that with the trustee, and ultimately with the beneficiary.

The data required is identical to that required for legal persons (see section (i)), with the addition of the following:

- Identity of the settlor, beneficiary and trustee

In any case, the UBO Register Regulations establish the obligation to provide the identification data of the legal person or unincorporated entity in respect of which the beneficial ownership is communicated. In particular:

- Company name
- European Unique Identifier (EUID)

- Spanish Tax Identification Number (NIF)
- Legal form
- Registered office

It is foreseen that the above information that is added to the UBO Register will be kept and updated throughout the life of the legal persons or unincorporated entities or structures, and will be maintained for a period of 10 years after they cease to exist.

4. Access to UBO Register information

A. Authorised persons

The UBO Register Regulations distinguish between different levels of access to the information contained in the UBO Register:

(i) Private third parties (members of the public)

- They will have to pay an advance fee to cover the costs of the UBO Register and, where applicable, the sources of the data included in it.
- They may only access data consisting of the surname and first name, month and year of birth, country of residence and nationality of the current beneficial owners of a legal person or entity or structure without legal personality.
- Access to the information available in the UBO Register will require prior identification of the applicant, accreditation of the capacity in which access is requested and, in the case of information on trusts or similar legal instruments, the demonstration of a legitimate interest on the part of the individuals in their knowledge.

The Regulations do not define the concept of legitimate interest and neither does the Fifth Directive, providing that its definition will be governed by the law of the Member State in which the trustee of a trust or the person holding an equivalent position in an analogous legal arrangement is established or resident².

²Where such a person is not established or resident in a Member State, access to information and the definition of legitimate interest will be governed by the law of the Member State in which the beneficial ownership information is registered.

In this regard, the Fifth Directive provides that Member States should define legitimate interest³, as a general concept and as a criterion for accessing beneficial ownership information in their national law, and as the only criteria to be considered it notes that such definitions: (i) should not restrict the concept of legitimate interest to cases of pending legal or administrative proceedings; and (ii) should allow for taking into account, where appropriate, preventive work in the field of anti-money laundering, counter terrorist financing and related predicate offences by non-governmental organisations and investigative journalists.

- The person in charge of the UBO Register may refuse access to information on the grounds that any of the following exceptional circumstances apply in the specific case: (i) the information may expose the beneficial owner to a disproportionate risk; (ii) the information may expose the beneficial owner to a risk of fraud, kidnapping, extortion, harassment, violence or intimidation, and other similarly serious risks; or (iii) the beneficial owner is a minor or a person with limited capacity or subject to special protection measures (“**Exceptional Circumstances**”).

According to the UBO Register Regulations, in any case, the above Exceptional Circumstances must have been disclosed by the data subject to the manager of the UBO Register and restricted access to the information must have been requested. However, the Regulations do not specify how or when the data subject should make such a request for restricted access to the UBO Register or disclose the existence of any of the above Exceptional Circumstances⁴.

³ In this regard, reference may be made to Opinion 06/2014 on the notion of legitimate interest of the data controller under Article 7 of Directive 95/46/EC, adopted on 9 April 2014 by the Article 29 Data Protection Working Party (the “**Opinion**”), which states that a legitimate interest must: (i) be lawful (i.e. in accordance with applicable EU and national law); (ii) be sufficiently specific; and (iii) represent a real and present (i.e. non-speculative) interest. The Opinion includes a non-exhaustive list of some of the most common contexts in which a legitimate interest may arise that must be weighed against the interests and fundamental rights of the data subject: (i) the exercise of the right to freedom of expression or information, including situations where that right is exercised in the media and the arts; (ii) conventional direct marketing and other forms of marketing or advertising; (iii) unsolicited non-commercial messages, including those pertaining to political campaigns or fundraising for charitable organisations; (iv) the enforcement of legal claims, including the collection of debts through out-of-court procedures; (v) prevention of fraud, misuse of services or money laundering; (vi) monitoring of employees for security or management purposes; (vii) internal whistleblowing channels; (viii) physical security, IT and network security; (ix) processing for historical, scientific or statistical purposes; and (x) processing for research purposes (including marketing research).

⁴ One possibility would be for data subjects to make such a request in general terms once the data has been submitted to the UBO Register (where appropriate, by means of the first declarations and/or supplementary declarations) and that, once the person responsible for the UBO Register receives a request for access to information for which restricted access has been requested, he/she would inform the data subject so that he/she, in turn, can make whatever arguments he/she deems appropriate in order to justify the existence in the specific case of any of the Exceptional Circumstances. However, the UBO Register Regulations do not provide for such a transfer to the data subject for the purpose of submitting arguments.

(ii) Obligated subjects under Law 10/2010

- They will have to pay an advance fee to cover the costs of the UBO Register and, where applicable, the sources of the data included in it.
- They will have access to current information contained in the UBO Register and will be able to obtain information on the nature and extent of the beneficial interest held and of that beneficial ownership.
- They will be required to provide identification and proof of the capacity in which access is requested.
- There will be a presumption of legitimate interest for access to information on trusts.
- They will obtain an electronic certification or an extract from the register for the fulfilment of their obligations regarding the identification of the beneficial owner.

However, the UBO Register Regulations stress that, in cases of business or customer relationships with above-average risk, obliged subjects should not rely solely on the information contained in the UBO Register and should carry out additional verifications through any other means of evidence at their disposal.

- They may not be denied access due to Exceptional Circumstances when they request access in order to fulfil their obligations to identify the beneficial owner.

(iii) Notaries, registrars, and authorities responsible for the prevention and suppression of terrorist financing offences, money laundering and its predicate offences⁵:

- They will be able to access the information contained in the UBO Register free of charge and without restriction.
- They will only be required to provide prior identification and proof of the capacity in which access is requested.

⁵ According to the Regulations, these public authorities are: the Public Prosecutor's Office, the bodies of the Judiciary, the Security Forces, the National Intelligence Centre, the Centre for Intelligence against Terrorism and Organised Crime, the Commission for the Prevention of Money Laundering and Monetary Offences and its support bodies, the supervisory bodies in the event of an agreement, the Office for the Recovery and Management of Assets, the State Tax Administration Agency, the Protectorate of Foundations and other authorities that are determined by the person in charge of the Register. For the purposes of the Fourth and Fifth Directives, the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences ("SEPBLAC") has the status of Financial Intelligence Unit ("FIU") in Spain.

- They will have access not only to the current data on the ownership of the person or entity, but also to: (i) the historical data for which information exists in the UBO Register; (ii) the nature and extent of the beneficial interest held and of that beneficial ownership; and (iii) whether the beneficial ownership is due to the control of the property or of its the management body.
- They may not be denied access due to Exceptional Circumstances.

B. Means of access

Access to the information contained in the UBO Register will always be by electronic means, following authentication. In any case, the application must be electronically signed in the name of the legal person concerned or on its behalf.

C. Cross-border access

The UBO Register will be interconnected through the European Central Platform⁶ with the other central registers of the Member States containing information on beneficial owners⁷, in order to provide national and cross-border access to information.

5. Data protection

The UBO Register Regulations contain provisions on the protection of personal data. Firstly, it is noteworthy that the UBO Register Regulations reiterate the persons whose data must be included in the UBO Register (as indicated in Article 1), including, once again, Spanish legal persons and entities without legal personality, data which, strictly speaking, is not of a personal nature, and therefore is not affected by the regulations in this regard. In any case, and in accordance with the principle of transparency of information contained in the General Data Protection Regulation⁸, the UBO Register Regulations establish the duty to inform natural persons whose personal data is included in the UBO Register as beneficial owners.

⁶ The platform provided for in Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, most recently implemented by Commission Implementing Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in the Fourth Directive.

⁷ The Beneficial Ownership Register Interconnection System (“BORIS”) will be a decentralised system interconnecting the national central registers of beneficial ownership and the European e-Justice Portal through the European Central Platform. The BORIS system will act as a central search service and provide all information relating to beneficial ownership.

⁸ See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

For the purposes of the General Data Protection Regulation, the UBO Register Regulations provide for the following with regard to the information and the processing of personal data:

- The purpose and use of the processing of the data included in the UBO Register will be as provided for in Law 10/2010.
- The categories of personal data are: name, surname, ID card number, Spanish foreigner identification number (NIE), nationality, country of residence, date of birth and the percentage stake held.
- The personal data will be public, albeit with the limitations established in the Royal Decree. This point has led to two questions being referred to the Court of Justice of the European Union for preliminary rulings (Joined Cases C-37/20 and C-601/20), which are still *sub judice*.
- The UBO Register Regulations establish that the data controller is the Ministry of Justice, since it is in charge of the UBO Register. In addition, it provides that the DGSJFP will be in charge of the processing and establishes that the rights to access, rectify, cancel and object in relation to the data declared directly to the UBO Register must be exercised before the DGSJFP. In this regard, the UBO Register Regulations erroneously fail to include the rights of restriction of processing and portability.
- With regard to the security measures for the UBO Register, the UBO Register Regulations establish that these will be of medium level, in accordance with the National Security Scheme⁹ and, in particular, Articles 32, 32 *bis* and 33 of Law 10/2010.

On the other hand, in accordance with the principle of limitation of the period of retention of personal data, the information on natural persons included in the UBO Register must be retained for a period of 10 years from the date on which they cease to be the beneficial owner or, if no such date is stated in the UBO Register, from the date on which the UBO Register states that they are no longer the beneficial owner.

In accordance with the principle of accuracy in the processing of personal data, the personal data contained in the UBO Register should be updated, if necessary, and any inconsistencies should be reported by the manager of the UBO Register to the register from which the data originates. Similarly, obliged subjects and competent authorities should inform the UBO Register of any discrepancies they observe between the data in the UBO Register and the data available to them by other means.

⁹ See Royal Decree 3/2010, of 8 January, which regulates the National Security Scheme in the field of e-Government.

Lastly, if the information on beneficial ownership provided by the different channels is contradictory or discrepant, the UBO Register Regulations expressly establish that the most recent data which has been proven or, failing that, stated, will prevail, and exceptions may be established by resolution of the DGSJFP.

6. Penalty system

The Royal Decree provides that failure to comply with the UBO Register information and identification obligations will be considered a serious infringement for the purposes of Law 10/2010.

This entails the following for the infringing obliged subject: (i) a fine with a minimum amount of EUR 60 000 and a maximum amount of up to the higher of the following: (a) 10% of the total annual turnover of the obliged subject; (b) the amount of the economic content of the transaction, plus 50%; (c) three times the amount of the profits derived from the infringement, where such profits can be determined; or (d) EUR 5 million; and (ii) a public reprimand, a private reprimand or, in the case of entities subject to administrative authorisation to operate, the temporary suspension of such authorisation.

In addition, when the regulated entity is a legal person, the following penalties may be imposed on those who exercise administrative or management positions in the entity, or who act as an external expert, and were responsible for the infringement: (i) a fine for each of them of a minimum of EUR 3,000 and a maximum of up to EUR 5 million; and (ii) a public reprimand, private reprimand or removal from the position, with disqualification from holding administrative or management positions in any entity subject to Law 10/2010 for a maximum period of five years.

7. Entry into force, transitional regimes and other relevant deadlines

The Royal Decree and the Regulations are expected to enter into force three months after their publication in the Official State Gazette (“BOE”). As the only exception, certain provisions of the Royal Decree regarding the transfer of data between the UBO Register and the various registers of legal persons (the Spanish Association of Property, Commercial and Movable Property Registrars, the Register of Foundations under state jurisdiction, the General Association of Notaries and any other register that may collect information on legal persons or registered entities¹⁰) will enter into force on the day following its publication in the BOE.

¹⁰ By way of example: Registers of Non-State Foundations, Associations, Cooperatives or Agricultural Processing Companies.

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As long as the first submission of data to the above registers with competence for the registration of legal persons is not provided for, public authorities, obliged subjects under Law 10/2010 and private individuals may obtain information on the beneficial owners by accessing these registers.

Trusts and unincorporated entities or structures must make, within one month of the entry into force of the Royal Decree, a first declaration to the UBO Register of the information required by Law 10/2010 and provided for in the Regulations.

Similarly, in the event that the data on beneficial ownership provided by the different registers with competence for the collection of data on beneficial owners does not include all the data provided for in Law 10/2010 and in the Regulations, this must be rectified by the obliged subjects, or their management bodies if they are legal persons, also within one month of the entry into force of the Royal Decree, by means of a first supplementary declaration to the UBO Register.

This Legal Briefing was prepared by Mayte Requejo, Lidia González and Ignacio Sánchez, Of Counsel and Associates of the White Collar Crime and Investigations practice; as well as Andrea Sánchez and María Chávarri, Associates of the Intellectual Property and Technology practice.

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice. This document was prepared on 24 March 2022 and Pérez-Llorca does not assume any commitment to update or revise its contents.

For more information,
please contact:

Juan Palomino

White Collar Crime and Investigations Partner
jpalomino@perezllorca.com

T: + 34 91 423 20 87

Andy Ramos Gil de la Haza

Intellectual Property and Technology Partner
aramos@perezllorca.com

T: + 34 91 423 20 72