A THOUSAND AND ELEVEN LENSES ON BENEFICIAL OWNERSHIP IN UKRAINE

On 19 September 2023, the Cabinet of Ministers of Ukraine jointly with the National Bank of Ukraine adopted Resolution No. 1011 "***On the Introduction of Methodology for the Determination by a Legal Entity of its Ultimate Beneficial Owners***" (Methodology). This move was largely influenced by the International Monetary Fund's prerequisites under the four-year **Extended Fund Facility Program** for the extension of USD11.6 billion to Ukraine. A key condition of this financial support was the harmonisation of Ukrainian legislative processes for identifying ultimate beneficial ownership with the FATF standards, which were **published** by FATF in March 2023.

In this connection, the Ukrainian Ministry of Finance has **noted** that the newly adopted Methodology is a groundbreaking normative legal document, unparalleled in the global arena. This reflects Ukraine's commitment to elevating its financial regulatory framework to FATF recommended standards.

The Methodology is established to institute a uniform approach for the determination of the ultimate beneficial owners (UBOs) of a privately owned Ukrainian legal entity. Pursuant to the Methodology, the determination by a legal entity of its UBOs or the establishment of the fact of their absence encompasses several stages. These stages involve the investigation of signs, nature and extent of decisive influence (both direct and indirect) on the activities of the legal entity, the investigation of information about founders and other persons who exercise decisive influence over the legal entity, the systematisation and analysis of information about the UBO as well as the monitoring and updating of relevant information.

Below we provide a summary of the essential investigative stages and the corresponding methods as prescribed by the Methodology.

KEY STAGES OF INVESTIGATION

ESTABLISHING DIRECT CONTROL

The Methodology requires a meticulous assessment of direct ownership or control by scrutinising the extent of shares or voting rights possessed by each individual. The central objective is to determine whether such ownership equates to a significant influence over the legal entity's governance. This determination hinges on the Methodology's definition of a "substantial (key) portion" of the charter capital or voting rights within a legal entity. Specifically, it refers to the size of the voting share package in a joint-stock legal entity or the quantity of votes in a legal entity with limited or additional liability that could potentially confer direct or indirect decisive control.

In order to conduct this analysis, the legal entity must obtain information from a variety of reliable databases and documents. These sources according to the Methodology include, to name a few, the registers of securities owners, informational references, contracts with the central securities depository and shareholder account statements from depository institutions.

Additionally, the legal entity must review the record keeping system of shares maintained by the relevant securities depository, founding agreements detailing the size of participants' shares and the Ukrainian unified state companies register for information on charter capital and founders' shares.

Finally, the Methodology prescribes to approach registers of foreign states for data on founders or shareholders and to obtain official documents that verify foreign ownership in entities such as trusts or investment funds.

ESTABLISHING INDIRECT CONTROL

The Methodology for identifying the UBOs of Ukrainian legal entities is a detailed process that requires the collection and analysis of a wide array of data. This process is not limited to direct evidence of ownership or control but extends to various indicators of indirect decisive influence on the legal entity's activities. To this end, the Methodology prescribes a thorough review of internal documents that are foundational to the legal entity's ownership structure and governance. These documents according to the Methodology include the legal entity's charter, bylaws and any regulations pertaining to the management bodies which can be instrumental in determining all persons owning indirectly the substantial (key) portion of the legal entity's charter capital.

The Methodology emphasises the significance of analysing minutes of meetings held by the legal entity's management bodies. These records are important as they provide a window into the internal decision-making processes and can reveal patterns of influence or control that may not be immediately apparent. Similarly, corporate contracts that outline the rights and responsibilities of participants must be scrutinised to detect any embedded provisions that could confer indirect control.

The scope of investigation according to the Methodology also encompasses written agreements that govern the management of both tangible and intangible assets. These documents can contain information as regards the existence of indirect control mechanisms. In addition, the legal entity's financial footprint must be examined through its financial and tax reports, audit findings and any results from inspections of financial activities. These documents can be telling indicators of underlying control structures.

To ensure a comprehensive analysis, the Methodology also directs attention to open information systems and public records. Moreover, the personal explanations and documentation provided by the legal entity's officials and founders are considered valuable sources of information. These can confirm or clarify the nuances of control and influence that might not be captured in official records.

The Methodology further advises reviewing communications from external bodies, such as regulatory or oversight institutions which might provide external perspectives on the entity's governance. Additionally, state registration documents of civil status acts are included in the review process to ascertain the legal identities and backgrounds of individuals associated with the entity.

Lastly, in cases where the legal entity has international ties or foreign entities as founders or shareholders, the Methodology requires the verification of citizenship documents and the registration status of these foreign entities.

ANALYSIS OF LEGAL ENTITY STRUCTURES AND BENEFICIAL OWNERSHIP IN TRUSTS AND SIMILAR ENTITIES

In this respect, the Methodology requires a comprehensive examination of the legal entity's structure, starting with the founders and any trust owners — individuals who established the entity or hold assets for others' benefit. It extends to scrutinising protectors of trust (if any) who are overseeing that the trustees manage the trust in accordance with its terms. This process includes identifying beneficiaries, either individuals or entities that gain from the trust or legal entity, who may be defined by specific attributes or as a collective group. A crucial aspect of this investigation is establishing individuals conducting influence over the trust's operations or similar legal constructs, which could stem from direct control or a convoluted chain of ownership. Also, for entities akin to trusts, the Methodology prescribes to gather details on the beneficiaries sufficient to identify them when they assert their rights or receive due benefits.

APPLYING FURTHER METHODS

While our review of the investigation stages above incorporates the relevant methods for determining UBOs prescribed by the Methodology, it's important to note that the Methodology goes on to specifically require the application of further certain methods as follows:

ASSESSING AN INDIVIDUAL'S INFLUENCE ON A LEGAL ENTITY

Methodology outlines the procedures for establishing the nature and extent of beneficial ownership. This will involve a comprehensive understanding of the level of benefit, interest, or influence an individual may possess over a legal entity.

The Methodology provides that the legal entities must identify every founder, participant, shareholder or member linked to the entity's control or ownership who:

- directly own a key portion of the charter capital or voting rights of the legal entity;
- indirectly own a key portion of the charter capital or voting rights, particularly through related physical or legal persons, trusts or other similar legal formations;
- exert decisive influence through the right to control, own, use or dispose of all or part of the assets or the right to receive income from the activities of the legal entity, trust or other similar legal formation; and
- exert decisive influence on the formation of the composition, voting results of the management bodies, as well as the making of transactions that allow for the determination of the main terms of the economic activity of the legal entity or the activity of the trust or other similar legal formation and to make binding decisions that have a decisive impact on the activities of the legal entity, trust or other similar legal formation regardless of formal ownership.

The Methodology underlines the importance of not only identifying those with formal ownership but also those who, through various means have the ability to control or significantly influence the legal entity.

INVESTIGATING CONNECTIONS BETWEEN INDIVIDUALS

In the process of identifying the UBOs based on the characteristic of indirect decisive influence on the activities of a legal entity through the ownership by an individual of a key portion of the statutory capital or voting rights of the legal entity via related natural or legal persons, the Methodology instructs to examine information about the connections between individuals which may be utilised to secure greater benefit for oneself, can be based on familial relationships, property rights, organisational and administrative ties or contractual relations.

Although the Methodology is silent as regards the exact methods of establishing these connections, we think that in order to satisfy these requirements, a Ukrainian legal entity will be required to undertake a thorough investigative process aimed at determining the UBOs. This process can commence with a collection and examination of internal documentation that could reveal any signs of control or sway over the legal entity. Such documents may include shareholder registers, constitutive documents like articles of association and records of meetings. Additionally, the ownership structure must be scrutinised to identify all shareholders with a keen focus on those holding significant shares of capital or voting rights which could indicate direct or indirect control.

The next phase will likely involve a detailed analysis of the relationships between all identified individuals and the legal entity reviewing into familial ties, corporate linkages and contractual relationships that could suggest a form of indirect control or influence over the legal entity. A detailed map of ownership and control chain can then be created to highlight any individuals or entities that hold significant control points within the legal entity's structure.

Subsequently, the verification of the gathered information will be of essence. This can be achieved by looking at external sources such as public registers, credit bureaus and databases dedicated to monitoring legal entity ownership and control. Background checks on the identified individuals may also be conducted to reveal any potential undisclosed connections or interests that could affect the legal entity.

The final step in this process can be the assessment of the level of influence each identified person commands over the legal entity. This involves evaluating both formal and informal mechanisms of control. The aim will be to ascertain whether any of the relationships or connections create the capacity to exert a decisive influence on the legal entity's activities, whether directly or indirectly. This comprehensive assessment will be important to ensure that all possible avenues of control and influence are accounted for and that the UBOs are accurately identified in accordance with the Methodology.

ESTABLISHING FACTORS OF INFLUENCE OVER LEGAL ENTITY'S ACTIVITIES

Methodology requires that during the investigation of signs of indirect decisive influence on the activities of a legal entity through the exercise of control rights the Ukrainian legal entity must establish factors providing such influence on the activities of the legal entity as well as methods of exercising control rights and their subject composition. Methodology notes that the order and stages of investigation and determination of control, scope, content and sequence of conduct, indicated in the Methodology may change depending on the circumstances that arise during the investigation of the presence of control.

Despite that Methodology does not outline the process for establishing these factors we believe that in practical terms the Ukrainian legal entity may consider undertaking an adaptable investigative process clarifying the factors that could allow an individual or entity to operate significant influence over the entity's activities which may encompass financial stakes, contractual arrangements or other mechanisms that confer control.

Next steps may involve to discern the methods by which control is exerted by examining the rights associated with voting, share ownership or other forms of influence that enable the controlling party to steer the entity's activities. The investigation then may proceed to establish the composition of subjects exercising control which requires delineating the network of relationships and entities to detect the exact sources of power. This would include scrutinising corporate documents, contracts and financial statements together with conducting interviews with pivotal individuals. The ultimate objective will be to acquire a transparent understanding of who holds decisive influence over the legal entity's operations and the extent of this influence.

Acknowledging the variability of each case as noted above, the Methodology accepts that the investigative process may need to be tailored to fit the unique circumstances. This flexibility implies that the steps and their order may vary to address the particular complexities that emerge during the investigation.

ESTABLISHING INDICATORS AND EXISTENCE OF REALISATION OF A RIGHT TO CONTROL

The Methodology goes deep into the subtler forms of influence that may not be immediately apparent through direct ownership stakes in a legal entity. It addresses the various indicators that suggest an individual or entity could be exerting significant influence over the decision-making and operations of a legal entity albeit indirectly.

One such indicator according to the Methodology is the issuance of binding instructions. When an individual has the power to direct the management bodies of a legal entity bypassing standard procedural channels it implies a level of control that transcends what is documented in formal ownership records. This kind of authority suggests that the individual's influence is substantial even if it is not officially recorded.

Another sign of indirect control is the negotiation of significant contracts. If an individual is known to negotiate and agree on critical terms of transactions on behalf of a legal entity — transactions that are later merely ratified by the entity's management bodies — it points to a scenario where the management is only providing formal approval to decisions already made by the influencer.

The Methodology further points to the power of attorney as a potential indicator of control. When a person holds a power of attorney that allows him or her to conduct substantial transactions on behalf of a legal entity especially if this power extends beyond a year and does not require prior consent from the entity's management it is indicative of a high degree of trust and delegated authority.

Control over a legal entity's financial operations is another telltale sign. This is evident when an individual is authorised to perform transactions using the entity's bank accounts or has the capacity to block such transactions indicating control over the entity's financial resources.

Lastly, the Methodology notes that being listed as a founder or beneficiary when a legal entity opens accounts, except in cases where the entity's assets are part of a trust or similar formation is a clear sign of control or significant influence. This suggests that the person has a foundational role or stands to benefit directly from the entity which often correlates with a level of indirect control.

The signs listed above are not exhaustive but provide a framework for identifying indirect control.

While the beginning of this section detailed indicators of potential indirect decisive influence over a legal entity, the subsequent procedures in the Methodology offer a more procedural approach. They guide the identification of indirect decisive influence through control rights focusing on the steps to ascertain control and establish its presence rather than merely the indications of such control.

In that sense, the Methodology stresses the importance of understanding the scope and structure of the entity's assets that are under control and calls for the identification of individuals or entities that hold ownership or usage rights over these assets, either wholly or partially and requires a detailed examination of the nature and extent of these rights.

Next, it prescribes establishing the composition of the entity's management bodies and the procedures by which they are formed. This can reveal the mechanisms of control and influence within the entity's governance structure.

The Methodology further instructs the identification and analysis of contracts and agreements that grant certain individuals the power to dictate business activities, issue binding instructions or perform the functions of a management body. This step is key to understanding the formal and informal networks of influence that can dictate the entity's strategic direction.

Further, it is required identifying individuals who hold executive positions within the entity and also occupy similar roles in other entities and instructs compiling a list of rights that allow for the appointment of the majority of the supervisory board, management board and other governing bodies.

Additionally, the Methodology seeks to identify other conditions that may confer decisive influence on the entity's business activities, including obligations arising from commercial transactions or financial support conditions. If necessary, an in-depth study is to be conducted to explore the full extent to which individuals can exercise decisive influence over the entity's business activities. This may involve looking beyond the surface to uncover complex arrangements and relationships.

Lastly, the Methodology addresses the use of nominee owners or holders, which can be a method used to disguise the true controllers of an entity. This part of the investigation is critical for piercing through any facade that may be in place to hide the entity's actual influencers.

DETECTING SIGNS OF INDIRECT DECISIVE INFLUENCE WITHIN BUSINESS ENTITIES

This section of the Methodology is a guide for recognising the signs of indirect decisive influence that certain individuals or entities exert over business entities. It prescribes a comprehensive analysis of the underlying dynamics of control and influence within a business entity and requires looking into the contractual arrangements, the structure of corporate governance and the actual conduct of decision-making processes.

The indirect influence may emerge from various relationships and factors that allow these individuals or entities to make critical decisions impacting the business's market behaviour and strategy.

The Methodology suggests a thorough investigation into whether any connected persons can unilaterally determine crucial aspects of a business's market presence. This includes the power to set prices, dictate the assortment and volume of goods for supply and demand and make strategic decisions about production, market approaches, technical development, investments and supplier and customer selection. It also involves establishing whether these individuals have the authority to bind the business to additional obligations or to veto decisions that are pivotal to the legal entity's operations.

Moreover, the Methodology calls for identifying the network of influencers who possess the decision making capabilities outlined above. This network might consist of shareholders, board members or other entities with a contractual or operational grip on the business. It also considers the collective sway of a group of persons or entities that, when acting in concert hold the decision making power over the business entity.

ESTABLISHING MEANS OF SECURING DECISIVE INFLUENCE

The Methodology looks into the various avenues through which an individual or entity might secure a decisive level of influence over another person. This influence goes through the bounds of direct ownership, encompassing a spectrum of legal and managerial rights that can steer or significantly impact the entity's operations.

The investigation begins by considering the authority to define the legal entity's status through its founding documents. This encompasses the power to outline the entity's objectives, scope of activities, management structure, decision making protocols and guidelines for asset management. It extends to the right to control or utilise a substantial portion of the entity's assets whether directly or through intermediaries.

The focus of examination further shifts towards the rights and powers that confer decisive influence over the entity's management bodies, including the ability to direct the composition of these bodies, influence voting outcomes and shape pivotal decisions. It also includes the right to participate actively in governance, such as engaging in general meetings, influencing the agenda, electing management members and accessing internal information.

Additionally, the Methodology highlights the significance of the ability to issue binding directives that dictate the terms of business operations or to assume the role of a management body through contractual or other means. Holding key executive positions within supervisory or executive boards is also a marker of influence as is the right to appoint a majority of the members of these governing bodies.

The right to negotiate and agree upon the essential terms of significant transactions, which are then merely ratified by the management bodies is another indicator of control as is suggested by the Methodology which also considers the implications of financial and trade obligations or conditions of financial support that might bestow influence.

ESTABLISHING CORPORATE CONTROL

Methodology requires looking into the intricacies of control relationships within corporate structures, acknowledging the potential for multiple layers of control that can obscure the true ownership and influence over an entity. This is a critical component of a comprehensive guidance designed to penetrate the often complex and multi-tiered networks of corporate control.

The Methodology prescribes that when an entity is found to be under the control of another, it is imperative to investigate further to determine if this controlling entity is, in turn, controlled by another party. This recursive approach underlines that control can be nested within a hierarchy and may not be immediately apparent.

To unravel this hierarchy, the Methodology instructs the tracing of the control chain to its ultimate source. This means identifying each entity within the control structure to understand the final authority or the ultimate beneficial owner who exercises control without being subject to another's control.

The objective is to discover the apex of the control chain — the entity or individual who holds the reins of power and is not subordinate to any other controlling influence. This entity or person is the ultimate controlling party, whose identification is vital for compliance with financial regulations and anti-money laundering protocols. The practical application of this can be daunting, particularly within multinational corporations that may have numerous subsidiaries and associated entities across various jurisdictions. It demands meticulous investigation and often necessitates collaboration across different legal systems and regulatory environments.

This requirement responds to global initiatives aimed at enhancing transparency in business ownership and control mechanisms■

In **conclusion**, the overarching aim of the Methodology is to guide Ukrainian legal entities as regards how to correctly establish the true Ultimate Beneficial Owners (UBOs) of that entity and prepare an accurate ownership diagram listing not only UBOs but all participants of a legal entity, supported by *relevant certified documents*. The Methodology provides that the identification data for any UBO include full name, date of birth, citizenship(s) and identification documents such as a passport or tax identification number, where applicable.

Documents used by legal entity to identify the UBOs must be valid and contain all necessary identification data. In cases of doubt regarding the validity of these documents, verification is carried out using state electronic information resources. If access to these resources is unavailable, verification is based on documents or information provided directly by the individuals in question upon request. The Methodology notes that an individual who merely holds formal rights to a significant portion of the legal entity's capital or voting rights but acts as a commercial agent, nominee owner or intermediary does not qualify as a UBO.

The term "formal rights" refers to the possession of rights based on officially documented evidence, yet the holder of such rights is not the ultimate beneficiary but rather an agent or a representative. In addition, a representative acting on behalf of another based on power of attorney or other documents granting authority especially if issued for no more than one year, cannot be deemed the UBO. This distinction is critical in distinguishing between those who have apparent control and those who exercise actual decisive influence over a legal entity's activities.

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