LUX CMA
Luxembourg Capital Markets Association

GUIDANCE NOTE FOR
BOARD MEMBERS

IDENTIFICATION OF THE BENEFICIAL OWNER(S) FOR THE PURPOSES OF FILING WITH THE RBE WITH RESPECT TO ORPHAN SECURITISATION VEHICLES

WORKING GROUP | BEST PRACTICE
UBO IDENTIFICATION & KYC

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TABLE OF CONTENTS

PURPOSE OF THE GUIDANCE NOTE

Whilst the Luxembourg Law of 13 January 2019, as amended, establishing a register of beneficial owners (and referred to in the present publication as the "**RBE Law**") has been in force for several years and various Q&A documents have been published in this respect, uncertainty remains amongst market participants as to the treatment of an orphan securitisation vehicle, also referred to as a Financial Vehicle Corporation ("**FVC**").

A typical orphan securitisation vehicle is an entity whose share capital is not held by a natural person nor a commercial company but by a foreign Foundation or Trust, such as, for example, a Dutch "Stichting" or a Charitable Trust.

The RBE Law follows the broader anti-money laundering ("**AML**") criteria and implements the transparency requirements of Article 30 of Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD IV) by creating a central register of beneficial owners, abbreviated as "**RBE**", the purpose of which is to safekeep and make available relevant information on beneficial owners of Luxembourg entities registered with the Luxembourg Trade and Company Register. The RBE Law also implements the transparency requirements of Directive 2018/843/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD V). However, the usual techniques for identifying ultimate beneficial owners often fail for FVCs, as the shareholder(s) by design typically have no economic interest.

This Guidance Note addresses the question of who should be reported as the Ultimate Beneficial Owner ("**UBO**") or Controller of an FVC and aims to provide guidance on the steps to be taken in this process.

Indeed, there is still a debate in the Luxembourg market on how to deal with an orphan structure (whether in the form of a foreign Foundation or Trust). For the avoidance of doubt, it should be noted that where the RBE Law refers to a Foundation, it means a Luxembourg Foundation.

The **CSSF** has equally raised some concerns about the trend to report Board members provided by a corporate services provider as Controllers in the RBE. Although this issue is not specific to FVCs, it raises an important point regarding the extent to which the current RBE effectively reflects who controls and/or benefits from a securitisation structure.

The guidance below is based on standard securitisation transactions and a case-by-case analysis should always be carried out as small variations can have a significant impact.

Terms and abbreviations used in this document are defined in the attached Glossary in Appendix 1.

LEGAL BACKGROUND

To identify the ultimate or beneficial owner(s), the RBE Law refers to Article 1, paragraph (7) of the Luxembourg Law of 12 November 2004 on the fight against money laundering and terrorism financing transposing Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, as amended ("**AML Law**")[1].

ASSESSMENT

- **CONTROL THROUGH SHARES, VOTING RIGHTS OR OWNERSHIP INTEREST**

In accordance with the rules set by the AML Law, the first check in the process of UBO identification is to verify if there is any natural person who ultimately owns or controls the legal entity through direct or indirect ownership of a sufficient percentage of the **shares or voting rights or ownership interest** in that entity, including through bearer shareholdings, or through **control via other means**. A shareholding of 25% plus one share or an ownership interest of more than 25% in the legal entity held by a natural person shall be an indication of direct ownership. A shareholding of 25% plus one share or an ownership interest of more than 25% in the legal entity held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall equally be an indication of indirect ownership.

The shareholders are therefore the appropriate starting point for the identification of the UBO.

However, most FVCs will issue Notes and the sole equity holder will be the founding shareholder.

1. CHARITABLE SHAREHOLDERS

In order to achieve the objectives of the securitisation as detailed below, the sole founding shareholder of the FVC will typically be a charitable entity, whether it is a foreign Foundation or Trust. The key feature being that the shareholder must demonstrate that it has no economic interest in the structure and that it has no shareholders or beneficiaries

[1] Source: CSSF – Coordinated version of the Law of 12 November 2004 , updated on 12 August 2022 (N.B.: this consolidated text was drawn up by the CSSF for information purposes only. In case of discrepancies between the French and the English consolidated texts, the texts published in the Mémorial are the sole authoritative and universally valid version).

itself. The Articles of Association or Trust Deed therefore refer to the fact that any surplus that the FVC would distribute to its shareholder will be distributed to a charity.

Whilst the Q&A of the RBE does recognise Luxembourg Foundations, the scenario of a foreign Foundation or Trust is not foreseen.

Why is a securitisation typically set up as orphan structure?

Typically, the purpose of the securitisation is to transfer the risk associated with securitised assets to a new party and hence to remove the consolidation requirements for the Originator allowing them to free up risk weighted capital. As such, there is a need to ensure that the transactions or assets won't be consolidated on the balance sheet of the Originator, the Arranger or the Noteholders.

The AML Law designates as UBOs:

- In the case of **Fiducies** and **Trusts**, at least the following natural persons:
  - (i) the settlor(s);
  - (ii) the Trustee(s);
  - (iii) the protector(s); if any,
  - (iv) the beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; and
  - (v) any other natural person exercising ultimate control over the Trust by means of direct or indirect ownership or by other means.
- In case of legal entities such as **Foundations**, and legal arrangements similar to Trusts, the natural person(s) holding equivalent or similar positions as referred above.

The exceptional treatment for Foundations as described in the Explanatory Guide of the RBE[2] to register only the Foundation's founder and its board members, is **applicable to Luxembourg Foundations only**.

Depending on the legal structure of the Luxembourg FVC, shareholders or their representatives have different rights to interfere in the daily management of the FVC. However, in light of the legal documentation creating transactions that avoid discretionary decisions, shareholders involvement is generally limited to: (i) the approval of the annual financial statements and (ii) the replacement(s) of Board members (at the initiative of the FVC). Shareholders usually have a very passive role and therefore, do not exercise control over the entity through voting rights or other means.

[2] Source: RBE - Declaration of beneficial owners at RBE – Explanatory Guide (version 4_25/05/2020)

In the case of the usual charitable structure described above, it will not be possible to identify an individual person directly or indirectly holding more than 25% of the equity, as the charitable nature of the shareholder will usually mean that any surplus will be distributed to a charity. This charity may or may not be predefined when the structure is established.

In relation to Dutch "Stichtings", which are used for the vast majority of FVC when setting up an orphan structure, following consultation with the Dutch specialists to understand whether the consolidation of the Luxemburg FVC into the accounts of the Dutch Foundation was possible, this option was rejected because the accounting rules require a sufficient level of control. This confirms the lack of control of the management of a foreign Foundation or Trust over the FVC.

Based on the above, the conclusion is that if the FVC is held by a charitable shareholder, the latter is generally not a UBO within the meaning of the RBE Law.

2. OTHER SHAREHOLDERS

Besides the charitable shareholder, other investors could also hold equity interests in shares issued by the FVC.

One of the main advantages of the Luxembourg Law of 22 March 2004 on securitisation, as amended (the "**Luxembourg Securitisation Law**") is indeed the possibility to create segregated compartments within an FVC, each representing a distinct part of the assets and liabilities of the FVC. Such assets and liabilities are, by law, ring-fenced on a compartment-by-compartment basis, including in case of insolvency. The Luxembourg Securitisation Law expressly provides that the recourse of the relevant investors and creditors is limited to the assets of the given compartment. As a result, amongst investors, each compartment is treated as a separate entity, unless otherwise specified in the constitutional documents of the FVC. Each compartment can be liquidated separately, without it resulting in the liquidation of another compartment or the FVC as a whole.

The changes introduced by the **Amending Law** provides the possibility for equity-financed compartments to make certain decisions only at the compartment level in order to obtain increased investor protection. Only the shareholders or members who hold shares or units issued by the relevant compartment can approve the balance sheet or profit and loss accounts, provided such right is set out in the securitisation undertaking's constitutive documents. In other words, this means that equity-financed multiple compartment securitisation undertakings can now approve the balance sheet and the profit and loss statement of each compartment concerned by virtue of the votes of the shareholders of such compartment only.

It will be important to determine the beneficial interest for each of those, as they could indeed be considered to be a UBO. However, in the RBE, it is not possible to register the UBO of one compartment. Whilst an equity owner in one compartment can be identified as UBO of this specific compartment, it can be challenged that the latter be identified as the UBO of the entire multi-compartment structure.

Article 1 of the RBE Law refers to Article 1(7) of the AML Law regarding the definition of beneficial owner.

According to the AML Law, the beneficial owner in the case of companies is "*any **natural person** who ultimately owns or controls directly or indirectly a legal entity (including by bearer shares): **a percentage of more than 25% of shares, voting rights or participation in the capital or by other means***".[3]

The Amending Law allowing the equity financing on compartment level is new and there is no formed market practice in relation to such structures. LuxCMA is expecting to provide further guidance on the matter.

3. NOTEHOLDERS

Should Noteholders or persons behind them be considered as UBOs?

Notes are debt securities and hence cannot be considered as equity. Furthermore, Noteholders do not have any direct or indirect control over the FVC. Due to the legal nature of the Notes, Noteholders have only very limited rights in the corporate life of the FVC. Although they may have the right to attend any shareholders meetings, they have no voting rights.

At this stage, the Noteholders can´t be considered as UBOs for the purposes of the RBE registration.

[3] The complete definition of "Beneficial owner" is stated in Article 1(7) of the AML Law. The definition given above is an excerpt to facilitate reading and understanding.

- **CONTROL BY OTHER MEANS**

Simultaneously, and in addition to the identification of a natural person, if any, who ultimately owns directly or indirectly a sufficient percentage of a legal entity, the RBE Law also requires the identification of *"... any natural person who ultimately ... controls a legal entity through ...* ***control via other means ....***" The RBE Law and the related AML laws are not precise in the definition of "control via other means".

Other legal AML frameworks do not offer much help and hence one needs to consider which rules may be suitable to provide clarification. The control element is not only of relevance for the AML process but is also an important criterion for the accounting of a company.

The AML Law further specifies that "control via other means" may be determined in accordance with Articles 1711-1 to 1711-3 of the Luxembourg Law of 10 August 1915 on commercial companies, as amended (these provisions are related to the setting up of consolidated accounts) as well as in accordance with certain criteria pointing to dominant influence:

- the direct or indirect right to exercise a dominant influence over an entity, on the basis of a contract entered into with that entity or of a clause of the articles of incorporation of that entity, where the law governing that entity allows being subject to such contracts or such statutory clauses;
- the fact that a majority of the members of the administrative, management or supervisory bodies of the entity, in office during the financial year as well as the preceding financial year and until the preparation of the consolidated financial statements, were appointed through direct or indirect exercise of the voting rights of one natural person;
- the direct or indirect power to exercise or the actual direct or indirect exercise of a dominant influence or control over the entity, including the fact that the entity is placed under a single management with another undertaking; and
- an obligation, under the national law to which the parent undertaking of the entity is subject, to prepare consolidated financial statements and a consolidated management report.

As further confirmed by the RBE guidance[4], the existence of a shareholders' agreement or close family ties between shareholders or the power to appoint the members of the management bodies are criteria pointing to dominant influence and control via other means[5].

Whilst the majority of the FVC are operating under **LUX GAAP**, in the absence of guidance, international accounting rules may also offer some further guidance as to how effective control can be interpreted. The question of control under **IFRS** is raised to

[4] Please refer to pages 18 and 19 of the RBE Explanatory Guide – Version 4_25/05/2020

[5] Please refer to the CSSF Circular 19/732 on prevention of Money Laundering and Terrorist Financing dated 20 December 2019 for the broad definition of "control via other means".

understand if an investor has to consolidate an investment in its financial statements. Under IFRS, as adopted by the European Union, control is defined in two areas, namely IFRS 10 and IFRS 15:32.[6]

The control principle in IFRS 10 sets out the following three cumulative elements of control:

- power over the investee: the investor has existing rights that give it the ability to direct the relevant activities (that significantly affect the investee's returns);
- exposure, or rights, to variable returns from involvement with the investee; and
- the ability to use power over the investee to affect the amount of those returns.

A right to variable interest may be embedded in the mechanics of the Notes issued, however, these are typically pre-defined in scope before the subscription, e.g., as a rate linked to a reference rate or as return based on the investment performance. Noteholders don't have the right to amend the remuneration mechanics on their own initiative. Any change to the Terms & Conditions of the Notes will have to be accepted by the majority of all Noteholders.

The principles defined in IFRS 15:32, control of an asset is defined as the ability to direct the use of and obtain substantially all of the remaining benefits from the asset. This includes the ability to prevent others from directing the use of and obtaining the benefits from the asset.

NB: In practice, if a Noteholder consolidates the FVC's Financial Statements as a whole, the former informs the board of the FVC and the FVC must disclose it in its own Financial Statements.

Should there be any UBOs who own/control the Noteholder which consolidates the financial statements of the FVC as a whole in its books, these UBOs should be considered by the Board members of the FVC as potential UBOs for the whole structure.

Should the consolidation of one or several compartments represent 50% or more of the FVC, LuxCMA recommends that the Board members consider that the Noteholder as a dominant individual could be, at the discretion of the Board members, reported as a UBO via control by other means.

[6] Source: IFRS website (N.B.: In order to view the IFRS Standards, you need to be a registered user on the site. Once signed in, you will be able to view the Standards in HTML or PDF).

NB: should it be decided to register with the RBE the UBO of a specific compartment as "controlling", such UBO would be seen as controlling the whole FVC, as the RBE form does not provide for a difference between a compartment and a legal entity. In such cases, this will be further clarified under a "*fonction*" line whilst filing with RBE.

4. OTHER TRANSACTION PARTIES

It has to be verified if other transaction parties should be considered as exercising effective control, such as the Arranger, **Originator**, the Investment Manager, the Security Trustee or other stakeholders.

CONCLUSION

Where no natural person directly or indirectly owns or controls the FVC, the legally prescribed member(s) of the **Management** of the entity, also referred as Senior Managing Official(s) ("**SMO**"s), will usually have to be recorded as individual(s) controlling the FVC by other means.

It is necessary for the Board to be able to demonstrate that proper analysis has been conducted and documented considering all the relevant information in order to identify the UBO for the purpose of RBE filing.

GLOSSARY AND ABREVIATIONS

A	**Amending Law**	means the Law of 25 February 2022 on the amendment of the Luxembourg Securitisation Law and other laws.
	AML Law	means the Anti-Money Laundering Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended.
C	**CSSF**	means the Commission de Surveillance du Secteur Financier.
F	**FVC**	means the Financial Vehicle Corporation as per ECB definition laid down in Regulation ECB/2013/40.
I	**IFRS**	means the International Financial Reporting Standards – the accounting standards issued by the IFRS Foundation and the International Accounting Standards Board.

L	**LuxCMA**	means the Luxembourg Capital Markets Association.
	LUX GAAP	means Luxembourg Generally Accepted Accounting Principles.
	Luxembourg Securitisation Law	means the Luxembourg Law of 22 March 2004 on securitisation, as amended.
M	**Management**	means the Board of directors or the Board of managers of the FVC or its Management company.
O	**Originator**	means the party assigning assets to the FVC/SSPE in a securitisation transaction.
P	**Publication**	means this document as well as the information contained herein.
R	**RBE**	means the Beneficial Owner Register ("**Registre des bénéficiaires effectifs**"), abbreviated as "**RBE**".
	RBE Law	means the Luxembourg law of 13 January 2019 on the register of beneficial owners, as amended.

S	**Securitisation Regulation**	means Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation.
	SMO	means Senior Management Official.
	SSPE	means a Securitisation Special Purpose Entity as defined under the Securitisation Regulation.

U	**UBO**	means Ultimate Beneficial Owner.

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About the LuxCMA – Luxembourg Capital Markets Association

Created on 1 March 2019, the LuxCMA is a not-for-profit association (a.s.b.l.), registered at the RCSL (F12205), whose registered office is 6 rue Jean Monnet, L-2180 Luxembourg. The LuxCMA today represents memberships detailed on LuxCMA's website (www.luxcma.com), which is composed by banks, law firms and services providers, amongst others.

Working Group – Best Practice

The aim of this working group is to find practical solutions (or answers) to practical problems. Capital market participants are often confronted with varying practices among the numerous practitioners active in Luxembourg, including when it comes to compliance, accounting, presentation of the financial statements, clearing, reporting, or general legal questions, and the purpose of the group will be to identify any recurring problems or inconsistencies in such practices and to analyse whether it is possible to work out practical recommendations and good market standards which address such issues.

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