

Transparency Register

An Introduction into the Federal Act on the Transparency of Legal Entities and its Ordinance

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Introduction

Current regime (art. 697j and 790a CO) goes...

... alone 25 per cent of the share capital or right to vote...

... in a company whose participation rights are not listed on a stock exchange...

... within one month...

... give notice to the company...

... of the first name and surname and the address...

... of the natural person for whom it is ultimately acting...

... each natural person that controls the shareholder...

Introduction

... LTPA / LTPO!

... introducing a new Swiss transparency regime...

... inspired by EU regulation...

... with a centralized and government-run transparency register...

... with a broad(er) scope of affected Swiss and foreign companies...

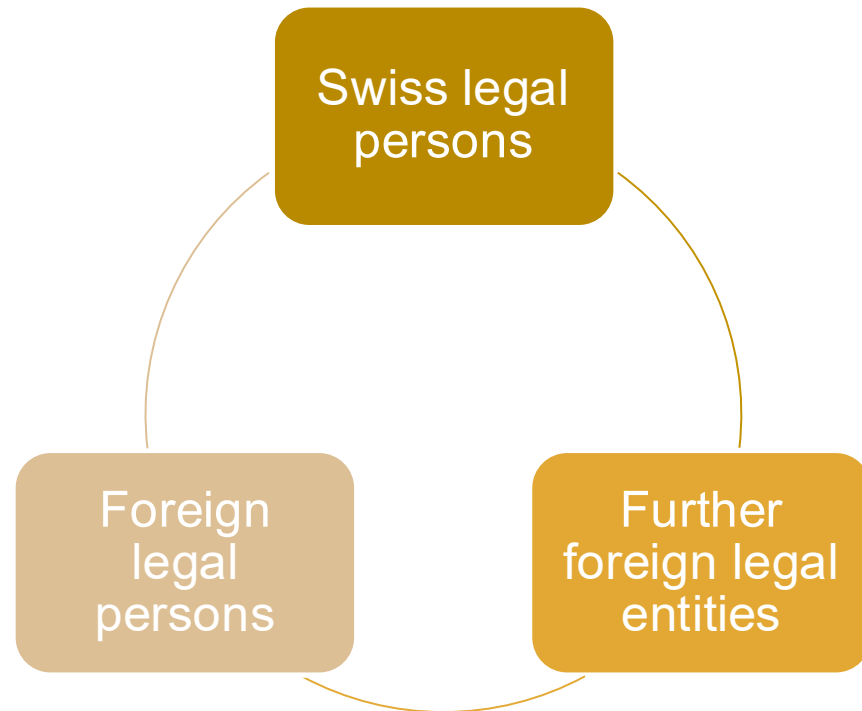
... with a broad(er) scope of potential ultimate beneficial owners...

... with a broad(er) scope of disclosure obligations...

... and with rather short transition periods!

Scope of Applicability

In-scope legal entities (1/2)



Swiss legal persons (art. 2 para. 1 lit. a LTPA)

- ❖ Exhaustive list of in-scope Swiss legal persons;
- ❖ No threshold / includes all SMEs;
- ❖ Exceptions:
 - Listed companies / state-owned companies
 - Pension funds, vested benefit and pillar 3a institutions

Foreign legal persons (art. 2 para. 1 lit. b LTPA)

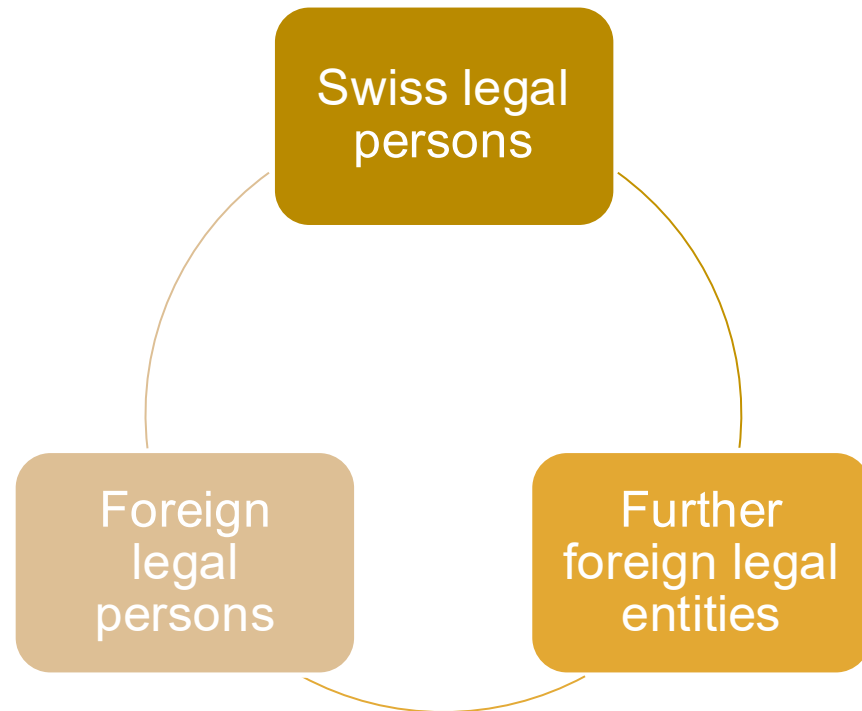
- ❖ Branch;
- ❖ De facto administration;
- ❖ Real estate.

Further legal entities under foreign law

- ❖ Trusts with the seat of the trustee or de facto administration in Switzerland (except if subject to AMLA; art. 2 para. 2 LTPA);
- ❖ Further foreign entities with de facto administration in Switzerland (art. 2 para. 3 LTPA).

Scope of Applicability

In-scope legal entities (2/2)

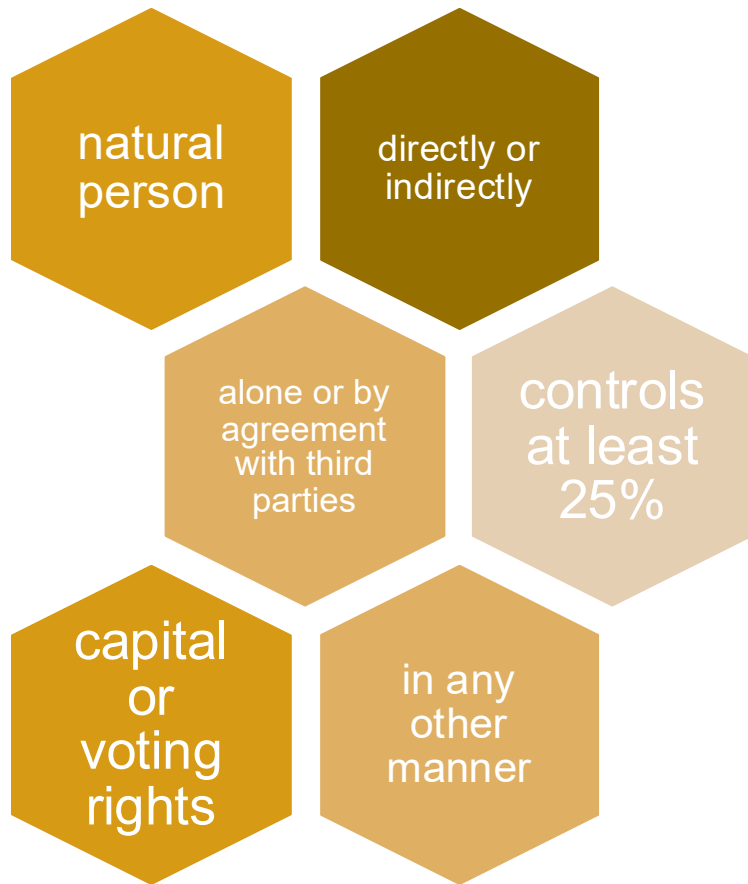


Key take-aways

- ❖ Rather straight-forward for Swiss legal persons; *but*
 - caution is advised when dealing with foreign companies, in particular with respect to “further foreign legal entities” determined in accordance with the respective country reports of the *Global Forum on Transparency and Exchange of Information for Tax Purposes*.
- Potential criminal sanctions for breaches of (dynamic?) provisions derogated from an inter-governmental body without regulatory power (for sanctions cf. separate slide).

Beneficial Owner

Definition (1/6)



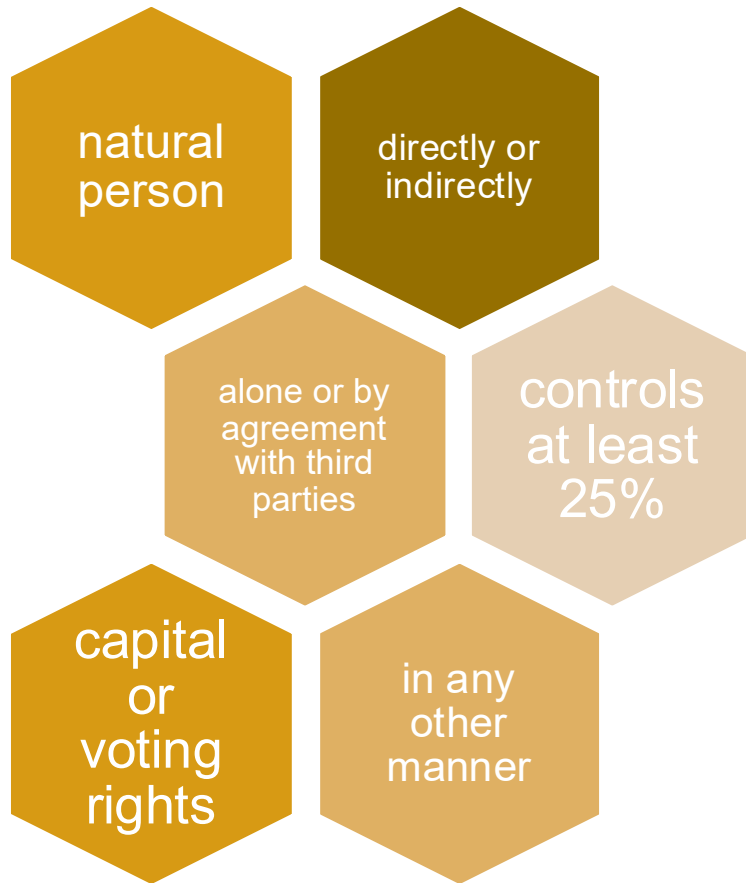
Definition of beneficial owners (art. 4 LTPA)

¹ The beneficial owner of a company is any **natural person** who ultimately **controls** the company by holding, **directly or indirectly, alone or by agreement with third parties**, at least **25 per cent** of the company's **capital or voting rights**, or who controls the company **in any other manner**.

² If no person meets the criteria set forth in paragraph 1, the **highest-ranking member of the supreme governance body** shall be deemed the beneficial owner.

Beneficial Owner

Definition (2/6)



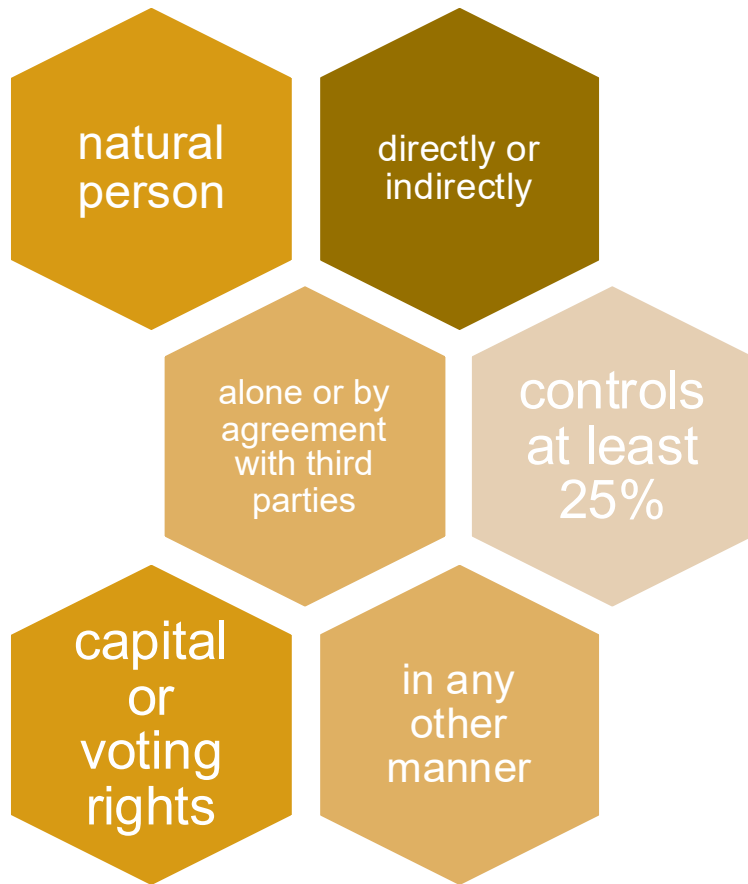
Special case: SICAV (art. 5 LTPA)

¹ The beneficial owner of a company is any natural person who, **as a company shareholder**, directly or indirectly holds at least a 25 percent stake in the sub-fund of the company shareholders or controls the SICAV in any other manner.

² If no person meets the criteria set forth in paragraph 1, the highest-ranking member of the supreme governance body shall be deemed the beneficial owner.

Beneficial Owner

Definition (3/6)



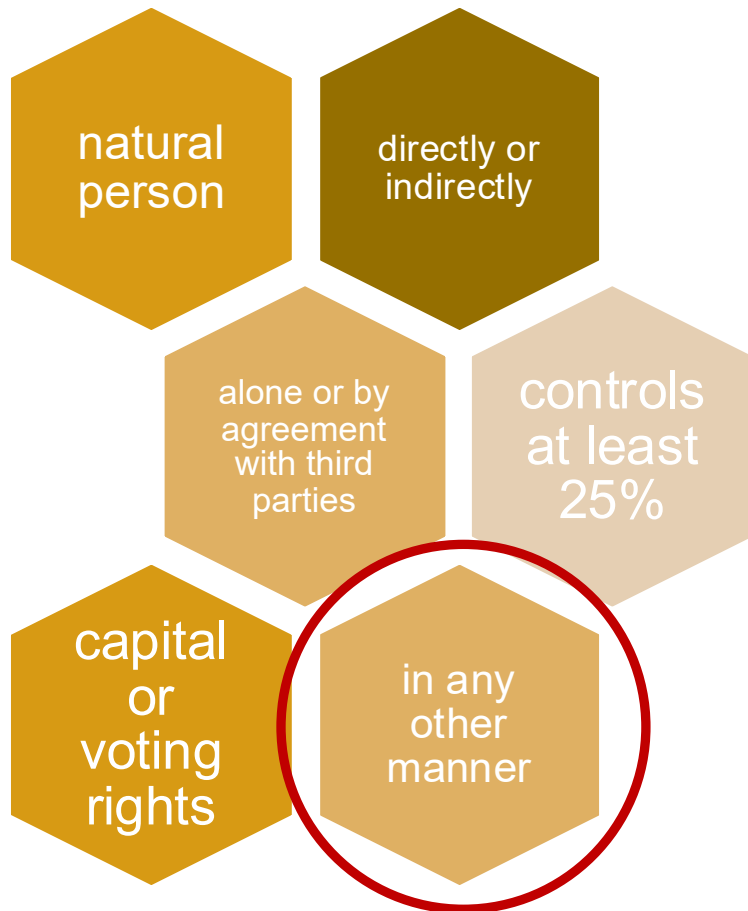
Special case: Trusts (art. 15 LTPA)

¹ The following natural persons are considered beneficial owners of a trust:

- a. the settlor;*
- b. the trustee;*
- c. the protector;*
- d. the beneficiary;*
- e. any other natural person who controls the trust directly, indirectly, or in any other manner, including the beneficial owners of a legal entity that is a party to the trust within the meaning of subparagraphs a through d.*

Beneficial Owner

Definition (4/6)

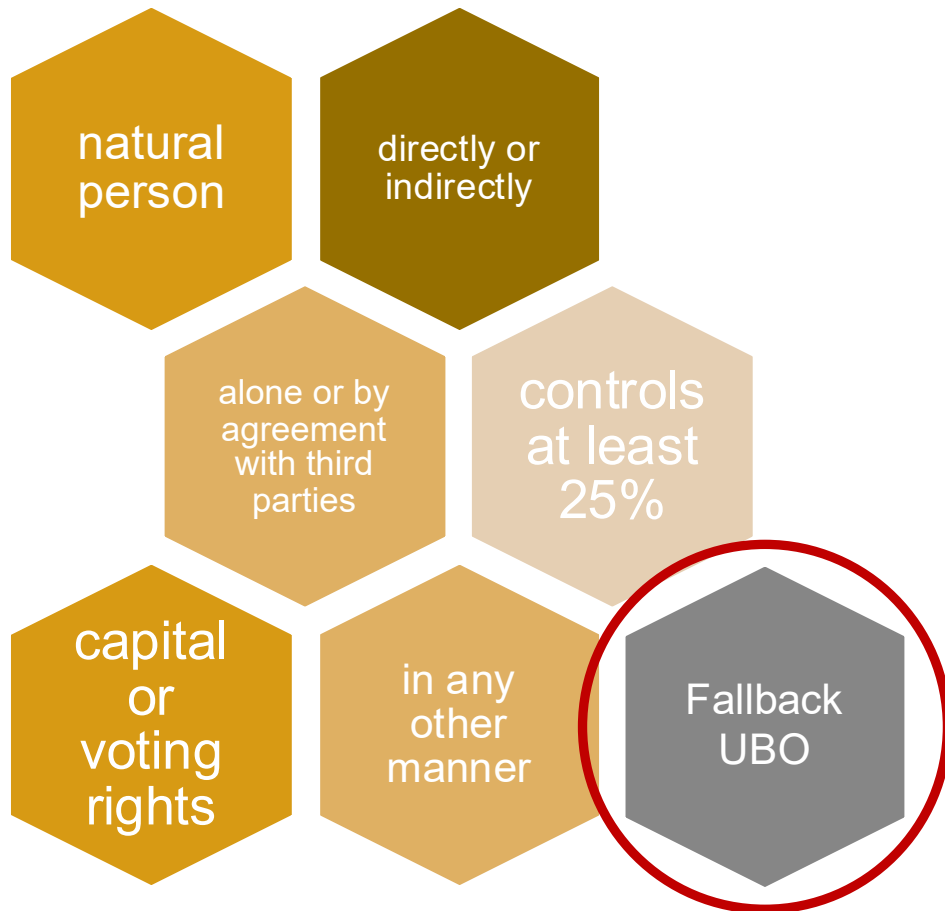


Control in “any other manner” (art. 3 OLTPA)

- ❖ Right to elect the majority of the board of directors;
- ❖ Veto rights;
- ❖ Right to resolve on dividend distributions;
- ❖ “any other form of exercising decisive influence within the company”, including through:
 - agreements with shareholders or partners;
 - debt instruments (including convertible loans);
 - corporate documents;
 - family relationships;
 - fiduciary arrangements;
 - etc. (non-exhaustive list).

Beneficial Owner

Definition (5/6)



Highest-ranking member of the supreme body

- ❖ Only applies if no person meets the criteria pursuant to art. 4 para. 1 LTPA;
- ❖ Applicable cascade (art. 11 para. 3 OLTPA):
 - chair of the executive management (CEO);
 - chair of the board of directors;
 - liquidator / administrator;
 - (comparable function in case of foreign legal entity).

Beneficial Owner

Definition (6/6)

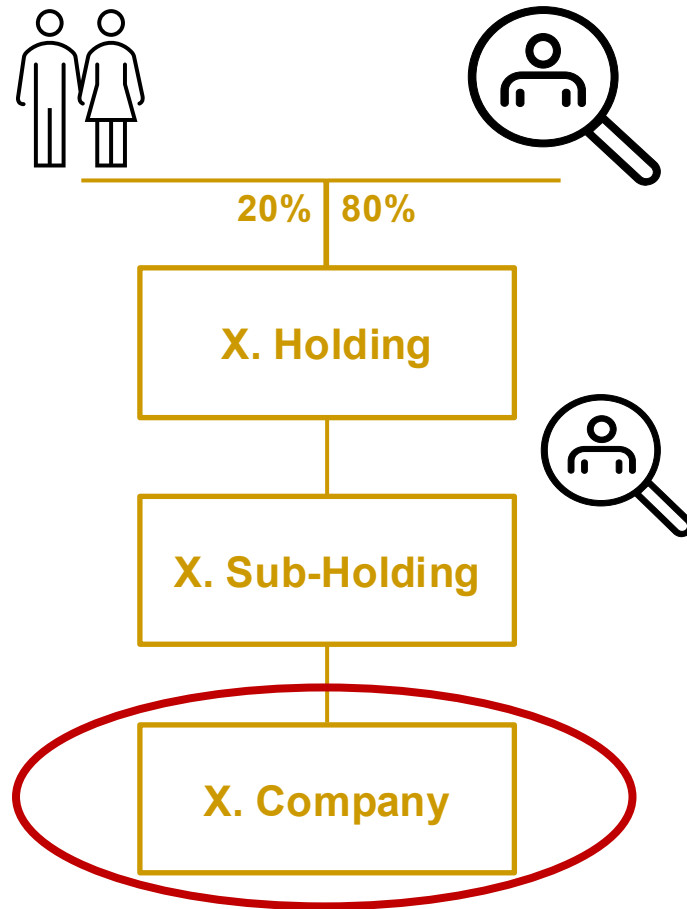


Key take-aways

- ❖ *Prima facie*, the existing regime for determining control remains applicable (25%), *but*:
 - expansion to control “in any other manner” brings uncertainty as it goes beyond the existing definition of “control” currently relied upon (cf. art. 963 para. 2 CO), *which*
 - can be problematic given potential criminal sanctions (for sanctions cf. separate slide).

Obligations of In-Scope Companies

Duty to identify



Identification of UBOs (art. 13 LTPA / art. 6 et seqq. OLTPA)

❖ Nature and scope of control:

- sole or jointly / direct or indirect;
- if through shareholding: % of participation (25/50/75%);
- if “in any other manner”: manner of control and % of capital or voting rights under control;

❖ Chain of control:

- If there is (i) a trust or at least two legal entities between the UBO and the company, (ii) a fiduciary relationship in the chain of control, or (iii) an embargo against a UBO,
- the company must obtain **information about the entire chain of control** (art. 7 para. 2 OLTPA);

❖ Includes duty to verify information obtained with the due diligence required by the circumstances;

❖ Simplifications in case of UBOs listed at a stock exchange.

Obligations of In-Scope Companies

Duty to notify

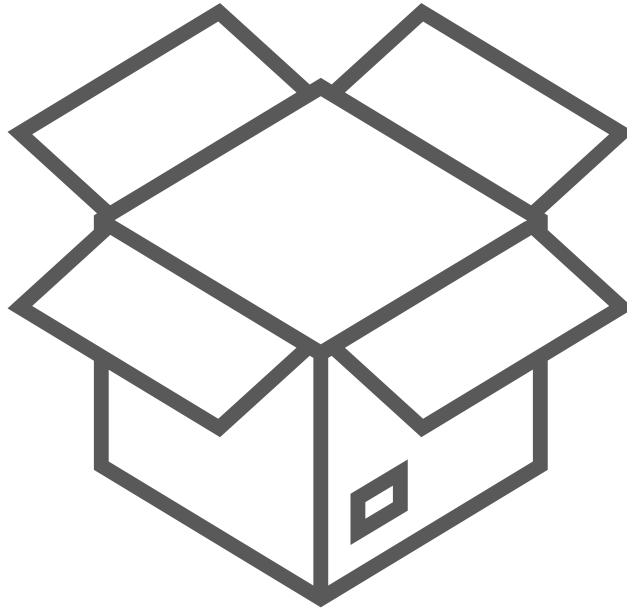


Notification of the Transparency Register (art. 9 et seq. LTPA)

- ❖ Generally, disclosure of all required information to the Transparency Register;
- ❖ If no identification was possible: Disclosure of all information obtained (incl. “useful” information) *plus* identification of highest-ranking member of supreme governance body;
- ❖ Deadline: One month from the registration in the Commercial Register or from relevant changes.
- ❖ Simplified procedure (art. 11 LTPA):
 - *pro memoria*: exemptions for listed companies;
 - for limited liability companies (art. 15 OLTPA);
 - for one-person corporations (art. 16 OLTPA);
- notification to the competent Commercial Register instead of the Transparency Register.

Obligations of In-Scope Companies

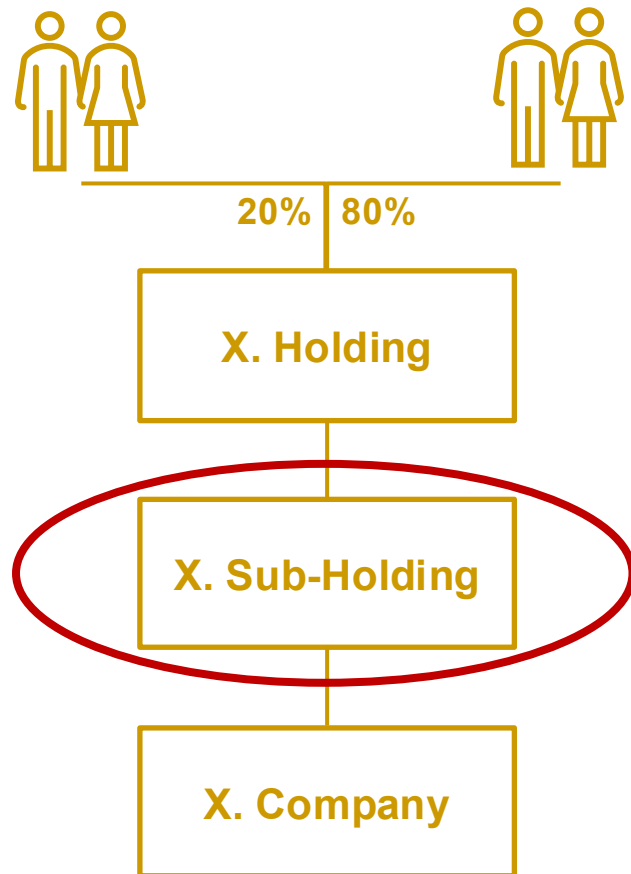
Duty to keep records



Duty to keep records (art. 8 LTPA)

- ❖ Information on beneficial owners **must be kept up to date** and accessible;
- ❖ If the company has been **unable to identify** the beneficial owner or to verify the beneficial owner's identity in a satisfactory manner, this fact must be documented as well as the steps taken;
- ❖ Records must be kept **10 years** from the moment the person ceases to be a beneficial owner (for trusts: 5 years from ceasing to serve as a trustee).

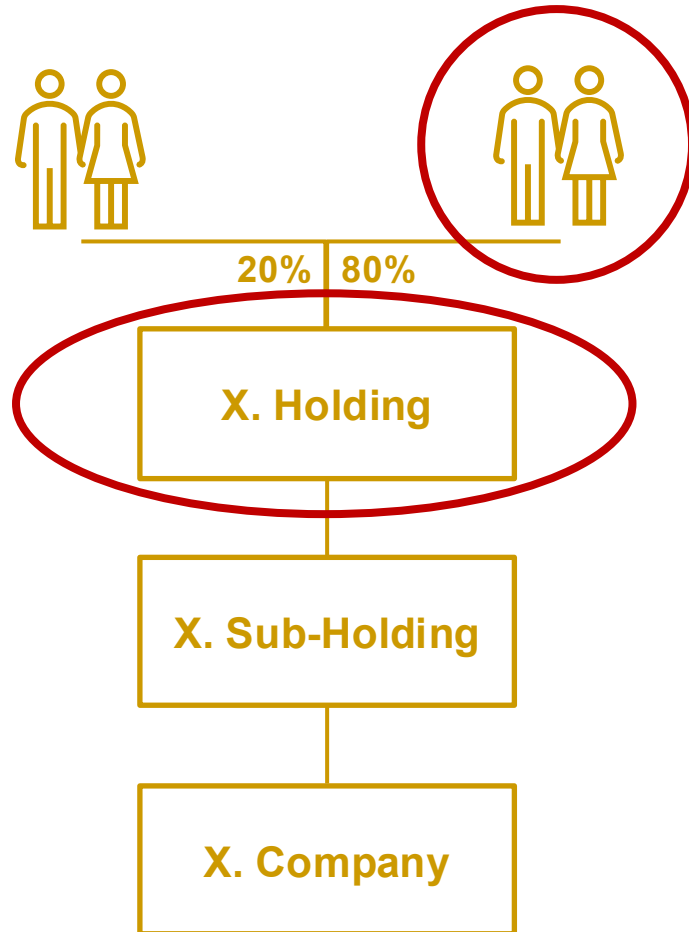
Obligations of Direct Shareholders



Obligations of shareholders (art. 13 LTPA)

- ❖ **Relevant information** of beneficial owner (or fact that beneficial owner is listed at a stock exchange with respective information on listing);
- ❖ Information on the **nature and scope of control**:
 - sole or jointly / direct or indirect;
 - if through shareholding: % of participation (25/50/75%);
 - if “in any other manner”: manner of control and % of capital or voting rights under control;
- ❖ If applicable, information on the **chain of control** (see above);
- ❖ Deadline: **one month** (incl. for changes).

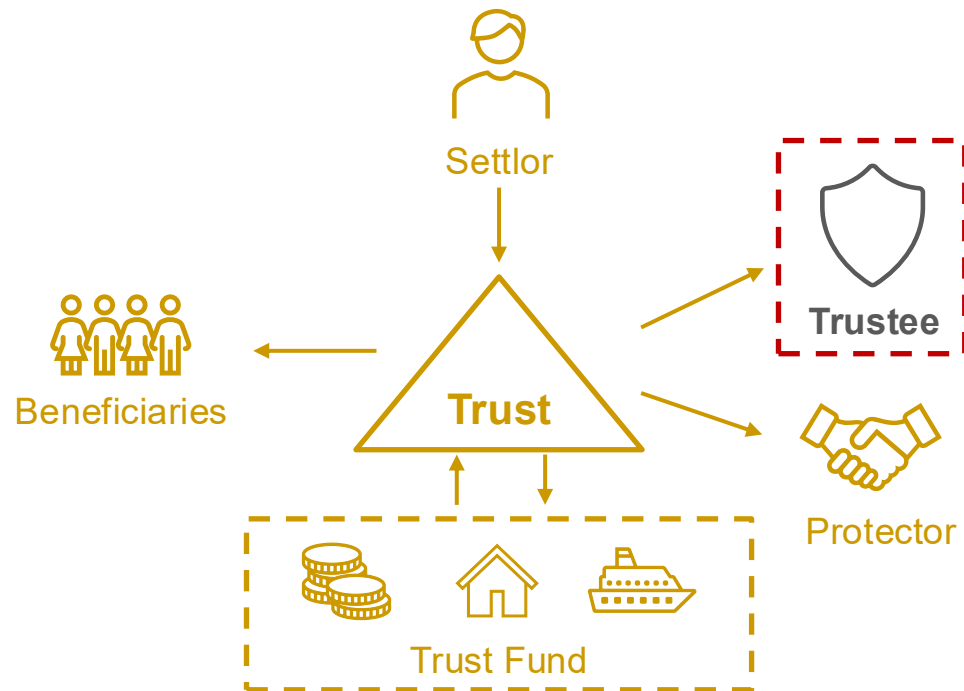
Obligations of Beneficial Owners and Others



Obligations of UBOs and third parties (art. 14 LTPA)

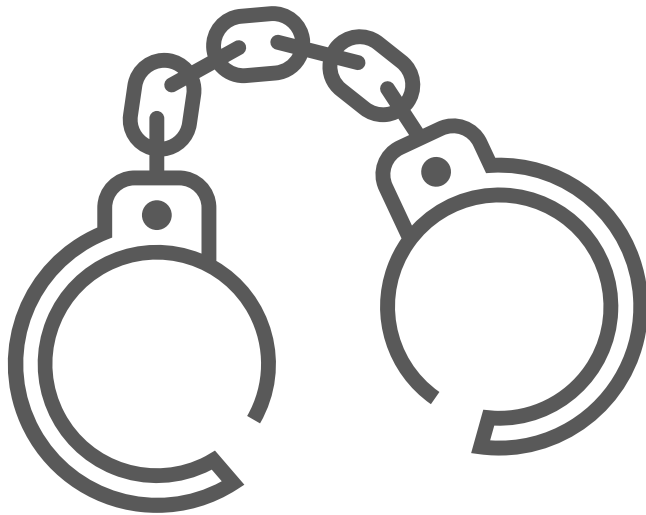
- ❖ **Beneficial owner** to provide information either to the direct shareholder (if control through direct participation) or to the company (if control is exercised in another manner or through multiple companies or persons (chain of control));
- ❖ Beneficial owners and **third parties in the chain of control** must cooperate in the verification of the beneficial owner's identity by providing the necessary information and supporting documents.
- ❖ Deadline: **one month** (incl. for changes).

Obligations of Trustees



Obligations of the trustee (art. 16 LTPA)

- ❖ **Identify** the beneficial owner and gather the relevant personal information as well as information on the nature and scope of control;
- ❖ Gather certain **information on financial intermediaries** and other financial or advisory providers with business relationships with the trust;
- ❖ If the trust deed specifies categories of beneficiaries, determine the **criteria for establishing beneficiary status**;
- ❖ **Document** the information and keep it **up to date**.



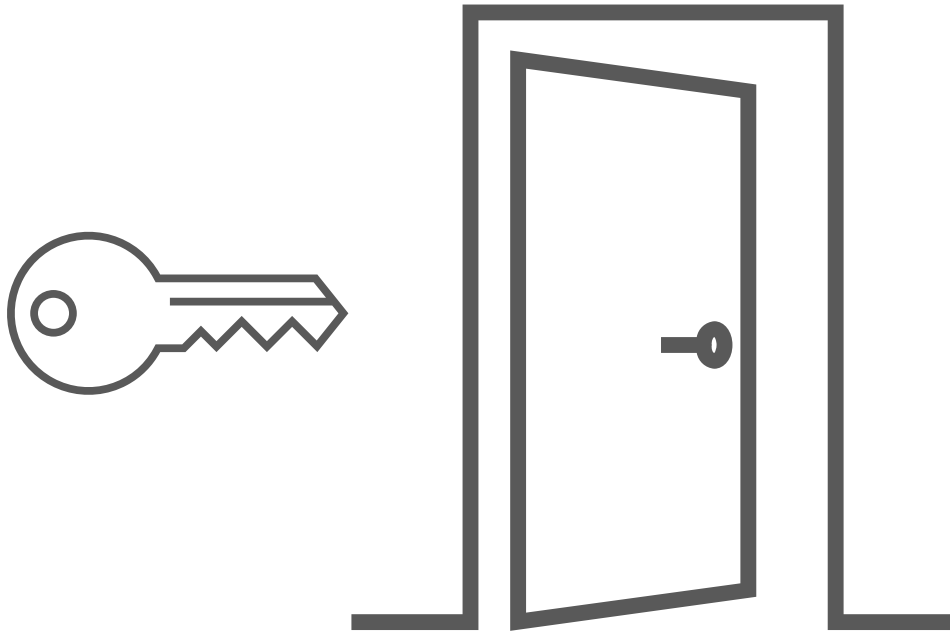
Administrative measures (art. 38 LTPA)

- ❖ Measures necessary to **restore the proper state** of affairs (submission of additional information, amend information in the register);
- ❖ **Suspension of membership and property rights**;
- ❖ **Dissolution and liquidation** of the legal entity (last resort).

Criminal sanctions (art. 43 et seq. LTPA)

- ❖ **Fines of up to CHF 500,000** for anyone who intentionally:
 - violates reporting obligations of shareholders and beneficial owners;
 - violates reporting obligations towards the Transparency Register or the Commercial Register;
 - makes false statements to the supervisory authority (incl. mandated third parties).
- ❖ Fines of up to CHF 100,000 for anyone who intentionally fails to comply with a final decision by the Control Authority.

Access to the Transparency Register



- ❖ Transparency Register is **not generally “public”**;
- ❖ Many **government agencies** can access all information (art. 26 LTPA);
- ❖ **Financial intermediaries and advisors** subject to the (revised) AMLA can access most information to the extent required to fulfill their due diligence obligations (use of data is limited to this purpose) (art. 27 LTPA);
- ❖ All legal entities can request “their” respective information (art. 28 LTPA);
- ❖ Individual requests based on art. 25 FADP.




- ❖ For **shareholders**, the reporting requirement under the LTPA is deemed met, provided compliance with art. 697j (or art. 790a) CO, and the persons reported are the beneficial owners pursuant to the LTPA.
 - No need to immediately act.
- ❖ **Companies** must submit the notification required under art. 9 LTPA within one month from the first amendment to their Commercial Register entry following the LTPA's entry into force but no later than within:
 - 3 months for corporations subject to ordinary audit;
 - 4 months for other legal persons subject to ordinary audit;
 - 5 months for corporations not subject to ordinary audit;
 - 6 months for other Swiss or foreign legal persons;
 - 2 years for legal persons with all beneficial owners registered in the Commercial Register as shareholders or members of a corporate body.
- In-scope companies must **take actions swiftly**.

BÄR
& KARRER

Thank you!



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