AUTORITÉ
DES MARCHÉS FINANCIERS

AMF

AMF Position - recommendation 2013-05

Guidelines on the notion of beneficial owner with regard to the fight against money laundering and terrorist financing

Background regulations: Articles L.561-2-2, L.561-5, R.561-1 to R .561-3 and R.561-7 of the Financial and Monetary Code and Articles 315-55, 321-31, 321-48, 321-57, 325-12, 550-10 and 560-13 of the AMF General Regulation.

The French anti-money laundering and counter terrorist financing system (AML/CTF) was recast with the transposition into French law of European Directive 2005/60/EC, known as the "Third Money Laundering Directive" and its Implementing Directive[1].

The purpose of these guidelines is to make more explicit the requirements for implementing the legal and regulatory provisions governing the concept of beneficial owner with regard to the fight against money laundering and terrorist financing, which must be complied with by the establishments referred to in paragraph 6° of Article L.561-2 of the Financial and Monetary Code and subject to the supervision of the Autorité des Marchés Financiers, namely:

- **asset management companies and management companies** as regards the investment services they provide or to the marketing of units or shares in collective investment schemes for which they may or may not act as a manager[2],
- **financial investment advisers,**
- **Central Security Depositaries and securities settlement systems managers**.

These guidelines[3] shall be read in conjunction with the guidelines[4] already available on the AMF's website and, as regards financial investment advisers, with the guide drafted by the AMF and published on the aforementioned website. Naturally, these documents do not exempt the professionals concerned by the anti-money laundering and counter terrorism financing programme from referring to the applicable laws and regulations so as to determine how to ensure strict compliance with them.

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[1] Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing - Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council.

[2] Articles 315-57, 321-31, 321-48, 321-57 325-12 of the AMF General Regulation require that management companies, when they implement their investment policy, either on their own account or on account of a third party, ensure that the risk of money laundering and terrorist financing is assessed and define procedures for supervising the investments made by their agents.

[3] The AMF takes part in the advisory council "fight against money laundering" set up by the Autorité de Contrôle Prudentiel (ACP), which ensures homogeneity between the guidelines published by the ACP and those published by the AMF. These guidelines have been the subject of prior consultation with the professional associations concerned and are intended to be updated in order to take into account the experience of the AMF and that of the professionals, and the upcoming legal or regulatory changes.

[4] "AMF Guidelines 2010-22 on combating money laundering and terrorist financing" and "AMF Guidelines 2010-23 on the obligation to report suspicious transactions to TRACFIN as part of the fight against money laundering and terrorist financing."

1. Which texts deal with the concept of beneficial owner and with the measures that apply to them as part of the fight against money laundering and terrorist financing ?

- ***At international level,*** the issue of “beneficial owner” is particularly addressed in the FATF Recommendations[5] (R24 and R25) and in their respective interpretive notes, which are available on the FATF’s website. In addition, this term is defined in the glossary of the FATF recommendations.

- ***At European level,*** the concept of beneficial owner is defined in 6) of Article 3 of European Directive 2005/60/EC which specifies the regime by which it is governed.

- ***National Law*** defines the concept of beneficial owner and the regime applicable to it, in particular in Articles L.561-2-2 and R.561-1 to R.561-3 of the Monetary and Financial Code[6] and in the AMF General Regulation, which particularly provides that professionals lay down in writing internal procedures pertaining to the application of the due diligence requirements for identifying a beneficial owner[7].

  The French Monetary and Financial Code is available on LEGIFRANCE’s website and the AMF General Regulation is available on the AMF’s website.

[5] The Financial Action Task Force is an intergovernmental body established in 1989 at the initiative of France and whose purpose is the development and promotion of national and international policies aimed at combating money laundering and terrorist financing both at national and international levels. The FATF elaborated 40 recommendations on anti-money laundering and terrorist financing, which were reviewed in February 2012.

[6] See : all the applicable provisions set forth in Chapter 1 of Title VI of Book V of the French Monetary and Financial Code, in particular the following articles : L.561-2-2, L.561-5, L.561-10-2, L.561-15, L.561-19, L.561-22, L.561-26, D.561-32-1, R.561-1 à R 561-3, R. 561-6 à R.561-10, R.561-13- I, R. 561-15, R.561-18 R.561-20-III, R.561-22 and R. 561-31.

[7] Pursuant to b) of 2° of Article 315-55 of the AMF General Regulation for asset management companies; pursuant to Articles 321-31, 321-48 and 321-57 for the other management companies; pursuant to Article 325-12 for financial investment advisers, pursuant to Articles 550-9 to 550-11 and 560-12 to 560-14 of the AMF General Regulation for central Security Depositaries and securities settlement systems managers.

2. Why focus on the concept of beneficial owner ?

As part of the prevention against the misuse of the financial system for the purpose of money laundering and terrorist financing, the primary objective is to prevent the misuse of legal persons by money launderers and terrorist financers.

Indeed, a person or some persons, called beneficial owner(s) can hide behind a structure which was incorporated in his/her/their interest with the twofold aim of:
- Dispelling any suspicion on the origin of the funds channelling through it
- Personally benefiting from the effects produced or channelling them for the purpose of terrorist financing or money laundering.

In some cases, financial vehicle corporations can be stacked on top of each other in order to conceal the beneficial owner(s) behind a "chain of ownership."

By encouraging transparency within these vehicles which may be used as financial vehicle corporations, the FATF demonstrated its willingness to phase out and, at the very last, to clamp down on the misuse of such vehicles to launder money or finance terrorism. The beneficial owner due diligence requirements are the international answer to this concern.

Accordingly, it is vital that professionals subject to these requirements determine the natural persons which shall be considered as the beneficial owners, pursuant to the applicable regulations.

3. What is the legal form of a beneficial owner?

The concept of beneficial owner was defined as follows by French lawmakers in Article L.561-2-2 of the Monetary and Financial Code:

- the natural person who directly or indirectly controls the client[8],

or

- the natural person on whose behalf a transaction or activity is being conducted.

Accordingly, the beneficial owner shall be understood as a natural person.

4. Is there necessarily a beneficial owner ?

Where the client, who is a natural person, acts on its own behalf, he/she is the effective and ultimate beneficiary of the transaction, there is no beneficial owner.

There is a beneficial owner where the client is not the person who benefits from the transaction, for instance:
- Where the client, who is a natural person, does not act on its own behalf and is controlled directly or indirectly by a third party, or conducts a transaction or activity for a third party,
- Or where the client is a legal entity, a collective investment scheme, or where it is operating pursuant to a "fiducie" or any other comparable legal person incorporated under foreign law.

In some cases, there may be no beneficial owner within the meaning of the applicable regulations. This is why lawmakers were careful to have the words "beneficial owner" preceded by the expression "as appropriate"[9] (see: question 12): What must be done in the absence of a beneficial owner?).

[8] The client may be understood as a natural person, legal person or legal arrangement. It may consist in a business relationship (a professional or commercial relationship which is expected, at the time when the contact is established, to have an element of duration, with or without a contract: Article L.561-2-1 of the Monetary and Financial Code) or an occasional client which uses the services of a professional for the sole purpose of preparing or completing a non-recurring transaction: Article R. 561-10 of the aforementioned Code).

[9] Pursuant to Articles L.561-5, R.561-6, R.561-7, R.561-10, R. 561-13, R. 561-15 and R. 561-31 of the Monetary and Financial Code for instance.

Conversely, a business relationship or transaction can involve several beneficial owners.

Position
Professionals must check whether there is one or several beneficial owners and, where appropriate, identify them and verify their identity.

5. On the basis of which criteria should one determine whether the beneficial owner is a company, a CIS, a special purpose fund or any other similar legal arrangements governed by foreign law?

Pursuant to Article R .561-7 of the Monetary and Financial Code, professionals subject to this regulation must be able to prove to the AMF that they have conducted due diligence to identify the beneficial owner(s) and verify its (their) identity.

In order to allow professionals to identify the beneficial owner(s) of a client other than a natural person, lawmakers have set criteria for determining the beneficial owners, depending on whether they are companies (A), collective investment schemes (B) or any other legal persons (C), i.e.:

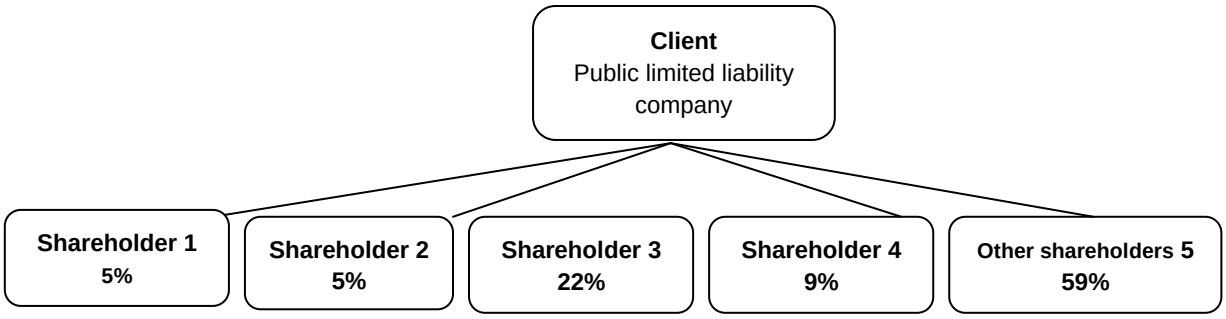
5.1. The client is a company (Article R.561-1 of the Monetary and Financial Code)

Where the client is a company, the professional must consider the following as the beneficial owner(s):

- Either the natural person(s) who hold(s) directly or indirectly 25% of the capital[10] or voting rights in the company. Where appropriate, the calculation of this percentage takes into account the chain of ownership (see: question 8: How to cope with a chain of ownership?).

- Or the natural person(s) who exercise(s), by any other means, control over the management, administrative and governing bodies of the company or over its shareholders' general meeting.

Example: The following graph illustrates the case of a professional falling within the jurisdiction of the AMF and whose client is a public limited liability company with its capital held by several individual shareholders.



The box "Other shareholders 5" refers to a highly fragmented group of individual shareholders (the capital held by each shareholder is less than 5%). Assumedly, one voting right is attached to each share.
Should such a situation occur, the professional must look for the potential beneficial owner(s) who meet the requirements set out in Article R. 561-1 of the Monetary and Financial Code.

In this example:
There is no natural person meeting the definition of beneficial owner in the sense of a natural person who holds directly or indirectly more than 25% of the shares or voting rights in the client company.

[10] Registered securities and bearer securities.

However, the professional concerned must check whether some shareholders, without holding more than 25% of the capital or voting rights in the client company, « exercise, by any other means, control over the management, administrative or governing bodies of the company or over its shareholders' general meeting » (Article R. 561-1 of the Monetary and Financial Code).

Accordingly, the professional shall reflect on the importance of the interest held by the shareholder 3 (22%) compared to those held by the other shareholders, which may, depending on the circumstances, allow him to exercise a power of control as referred to in the aforementioned Article.

5.2. The client is a collective investment scheme (Article R.561-2 of the Monetary and Financial Code)

The client may be a French collective investment scheme[11] or any equivalent under foreign law.

Under French law, the Autorité des Marchés Financiers authorises management companies and CISs, with the exception of some CISs such as contractual CISs or CISs with streamlined investment rules[12]. During the authorisation process, the AMF assesses the quality and honesty of the management companies' managers.

French CIS can have two legal forms:

- ***CIS without legal personality***[13], such as mutual funds, securitisation mutual funds, special purpose funds, real estate investment funds…
  An asset management company or management company incorporated for this purpose[14] manages these types of CIS and represents them with regard to third parties.

- ***OPC with legal personality*** (corporate form**)**, such as open-ended investment companies, real estate investment funds, closed-ended investment funds, forestry savings companies, funds investing predominantly in real estate, securitisation funds… Generally,[15] an asset management company or management company incorporated for this purpose manages these types of CIS and represents them with regard to third parties.

In reality, the professional is in contact with the management company of the CIS, which alone has the authority to complete transactions for the CIS. The shareholders or unitholders in a CIS have no control over the investment decision making process of the said CIS. Thus, it is on the basis of the risk posed by the asset management company representing the CIS that the client due diligence obligations, and in particular the obligation to identify the beneficial owner(s), shall be implemented.

Pursuant to Article R.561-2, the professional must consider as beneficial owner(s)[16] those natural persons who:

- hold, either directly or indirectly, more than 25% of the units or shares in the CIS. The calculation of this percentage takes into account the chain of ownership. (see question 8: How to deal with a chain of ownership?).

[11] The list of CIS governed by French law is laid down in Article 214-1 of the Monetary and Financial Code. It is specified that the CIS do not feature in the list of the persons governed by the anti-money laundering and terrorist financing programme laid down in Article L.561-2 of the Monetart and Financial Code.
[12] These two categories of CIS need only be declared to the AMF while their asset management company must be authorised by the AMF.
[13] However, these CIS are "clients" within the meaning of Article R.561-2 of the Monetary and Financial Code.
[14] Securitisation mutual funds are managed by an asset management company or by a debt securitisation fund management company, debt securitisation funds are managed by a debt securitisation fund management company, real estate investment funds are managed by a management company of real estate investment trust meeting the requirements of Article L.214-119 of the Monetary and Financial Code or by an asset management company.
[15] Except for self-managed open-ended investment companies (only one case to date). In other cases, delegations are implemented.
[16] In practice, the issue of identifying the beneficial owner of the CIS managed by a management company shall be addressed when the latter places an order on behalf of the CIS or when the CIS invests in an underlying fund.

- or exercise a power of control over the administrative or management bodies of the CIS or, as appropriate, of the management company or asset management company representing the said CIS[17].

However, it bears highlighting that the obligation to identify the beneficial owner of the business relationship is deemed to be fulfilled when the following four requirements are met (4° of Article R.561-of the Monetary and Financial Code):

- The absence of suspicion
- The risk of money laundering or terrorist financing is low
- The client of the CIS is a management company or an asset management company representing the said CIS, which are authorised by the competent authority in a Member State of the European Union or by a State party to the European Economic Area agreement or by a third country which imposes similar obligations in combating money laundering and terrorist financing and included on the list provided for in 2° of II of Article L. 561-9 of the Monetary and Financial Code[18].
- The professional subject to the obligation to identify the beneficial owner(s) verified that such an agreement exists.

Thus, lawmakers have significantly reduced the number of cases for when the obligation to identify the beneficial owner of a client CIS arises.

Position

The obligation to identify the beneficial owners of a customer CIS is particularly required in cases of suspicious transactions, where risks of money laundering or terrorist financing arise or where the CIS or its representative (the management company) is neither established nor authorised in a Member State of the European Union or in a State party to the European Economic Area agreement or in a third country which imposes similar obligations in combating money laundering and terrorist financing and included on the list provided for in 2° of II of Article L. 561-9 of the Monetary and Financial Code[19].

As regards CIS governed by French law, it also bears recalling that:

- Most French CISs (of the two kinds) are authorised and are aimed "at all investors"[20] and there are so many unitholders or shareholders that there are de facto no natural persons controlling the CIS via their shareholding. For their part, CIS reserved for qualified investors have a limited number of shareholders or unitholders and the management company is statutorily required to know their identity.

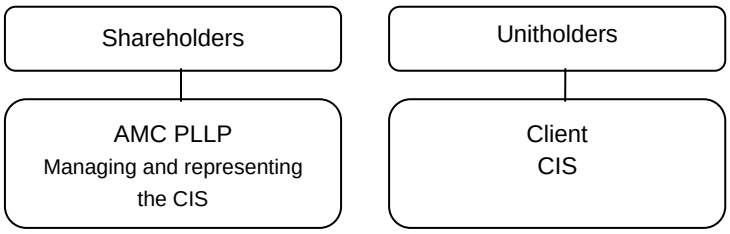
- French law provides that capital gains on sale of securities realised when managing a French CIS be exempted from this obligation, provided that no natural person holds directly or indirectly more than 10% of the units in the CIS. Failing this, investors are at risk of qualifying for another tax regime. This provision prompts management companies to ensure that this ratio is complied with and to inquire about the identity of investors holding more than 10% in the CIS.

- Lastly, if, owing to the way the French central custody and securities settlement system operates, the management company has no ongoing knowledge of the identity of the investors in the CISs, it nevertheless has the possibility, if needed, to identify them by interviewing its account keepers (at an added cost). Indeed, although units or shares are issued in the form of bearer securities, they are registered in the name of holders in a securities account kept by a French financial institution (account keeper) chosen by the management company and itself subject to the anti-money laundering scheme.

[17] Should the management company of the CIS use the transactions completed by the CIS to launder money, lawmakers have found it useful to secure the scheme by imposing mandatory identification of the persons who control the said management company (unless exempted in 4° of R.561-8 of the Monetary and Financial Code).
[18] Order of 27 July 2011 on the list of third countries imposing similar requirements on combating money laundering and terrorist financing.
[19] Order of 27 July 2011 on the list of third countries imposing similar requirements on combating money laundering and terrorist financing.
[20] Around 90% of CIS.

First example : CIS without legal personality

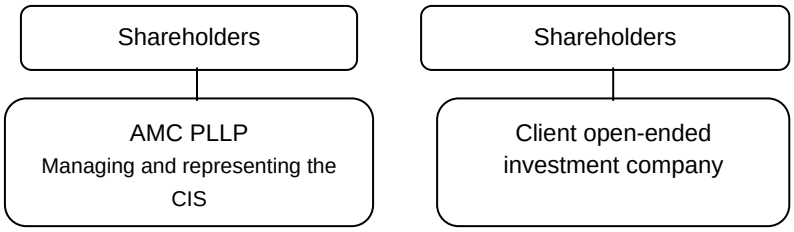
The graph hereinafter exemplifies the case of a professional falling within the jurisdiction of the *Autorité des Marchés Financiers* and whose client is an approved CIS governed by French law, which is managed and represented with regard to third parties by an asset management company incorporated in the form of a public limited liability company (shares carrying a single voting right). Assumedly, the presumptive identification provided for in Article R.561-8 of the Monetary and Financial Code does not apply.



In such a situation, the professional must look for the beneficial owner(s) who meet either the definition of a natural person holding directly or indirectly more than 25% of the units in the fund or the definition of a natural person exercising a power of control over the administrative or management bodies of the asset management company representing the CIS. In this particular case, this applies to natural persons who have a significant stake in the asset management company, which allows them to exercise a power of control over the administrative or management bodies of the said company.

Second example: CIS with legal personality

The graph hereinafter exemplifies the case of a professional falling within the jurisdiction of the *Autorité des Marchés Financiers* and whose client is an open-ended investment company governed by French Law managed and represented with regard to third parties by an asset management company incorporated in the form of a public limited liability company offering shares carrying a single voting right. Hypothetically, the presumptive identification provided for in Article R.561-8 of the Monetary and Financial Code does not apply.



In such a situation, the professional must look for the beneficial owner(s) meeting either the definition of a natural person holding directly or indirectly more than 25% of the shares in the open-ended investment company or the definition of a natural person liable to exercise a power of control over the administrative or management bodies of the asset management company representing the open-ended investment company.

5.3. The client is a natural person other than a company or a CIS[21] (Article R.561-3 of the Monetary and Financial Code)

Where the client is a legal entity not referred to in Articles R.561-1 and R.561-2 of the Monetary and Financial Code (neither a company nor a CIS), the professional must consider as beneficial owners those natural persons who meet one of the following requirements:

- They are destined, by way of a legal act which appointed them for the purpose, to hold the voting rights attached to at least 25% of the shares of the legal entity (Article R.561-3 of the Monetary and Financial Code);

[21] Associations, corporate foundations or economic interest groupings feature in the category.

- They belong to a group in whose main interest the legal entity has been set up or operates, when the natural persons who are the beneficial owners have not yet been appointed (2° of Article R. 561-3 of the Monetary and Financial Code).

- They hold the voting rights attached to at least 25% of the assets of the legal entity (3° of Article R.561-3 of the Monetary and Financial Code).

Example: The client of the professional falling within the jurisdiction of the *Autorité des Marchés Financiers* is an association which has been established pursuant to Law of 1 July 1901[22].

The natural persons, members of the association, who have or may have the right to recover their contribution to the capital in full at all times during the life of the association, whether this right is laid out in the articles of association or arises from a decision of the general meeting, shall be considered as the beneficial owners within the meaning of Article R.561-3 of the Monetary and Financial Code in respect of the persons who are destined, by way of a legal act which appointed them for the purpose, to hold the voting rights attached to at least 25% of the assets of the association.

- ***The client operates under a "fiducie" (Article R.561-3 of the Monetary and Financial Code)***

Where the client operates under a "fiducie"[23], the professional shall consider as beneficial owners those natural persons who meet one of the following requirements:

- They are destined, by way of a legal act which appointed them for the purpose, to hold the voting rights attached to at least 25% of the assets transferred to the fiduciary assets (1° of Article R. 561-3 of the Monetary and Financial Code);

- They belong to a group in whose main interest the "fiducie" has been incorporated or operates, when the natural persons who are the beneficial owners have not yet been appointed (2° of Article R. 561-3 of the Monetary and Financial Code);

- They hold the voting rights attached to 25% of the assets of the "fiducie" at least (3° of Article R. 561-3 of the Monetary and Financial Code);

- They are either individuals, fiduciaries or beneficiaries pursuant to the provisions set forth in Title XIV of Book III of the French Civil Code (4° of Article R. 561-3 of the Monetary and Financial Code).

- ***The client operates under any other similar legal arrangement (special-purpose assets) governed by foreign law (article R.561-3 of the Monetary and Financial Code)***

Where the client conducts business within the framework of a special purpose fund governed by foreign law[24], the professional shall consider as beneficial owners those natural persons who meet one of the following requirements:

- They are destined, by way of a legal act which appointed them for the purpose, to hold the voting rights attached to at least 25% of the assets transferred to a special purpose fund governed by foreign law (1° of Article R. 561-3 of the Monetary and Financial Code)

- They belong to a group in whose main interest the special purpose fund has been incorporated or operates, when the natural persons who are the beneficial owners have not yet been appointed (2° of Article R. 561-3 of the Monetary and Financial Code)

[22] The professional must check this point.
[23] The concept of fiducie was introduced in the Civil Code (articles 2011 and onwards) by Law of 19 February 2007. It is defined as *"the operation by which one or several constituents transfer the properties, the rights or the warrants, or a set of properties, rights or warrants, present or future, to one or some fiduciary (trustee) who, holding them separated from its own properties, act in a purpose determined for the benefit of one or several beneficiaries."*
[24] The Anglo-Saxon trust, German *treuhand*, Mexian *fideicomisos,* Swiss trust, Canadian Trust, Liechtenstein foundation and *waqf* governed by Islamic Law all feature in the category of special purpose funds governed by foreign law.

- They hold the voting rights attached to at least 25% of the assets of the special purpose fund (3° of Article R. 561-3 of the Monetary and Financial Code (3° of Article R. 561-3 of the Monetary and Financial Code).

Example : The graph hereinafter illustrates the case of a chain of special purpose funds governed by foreign law where five family-owned companies made up of non-resident natural persons, personally and professionally linked to each other, set up each an asset management structure (1 to 5) governed by foreign law.

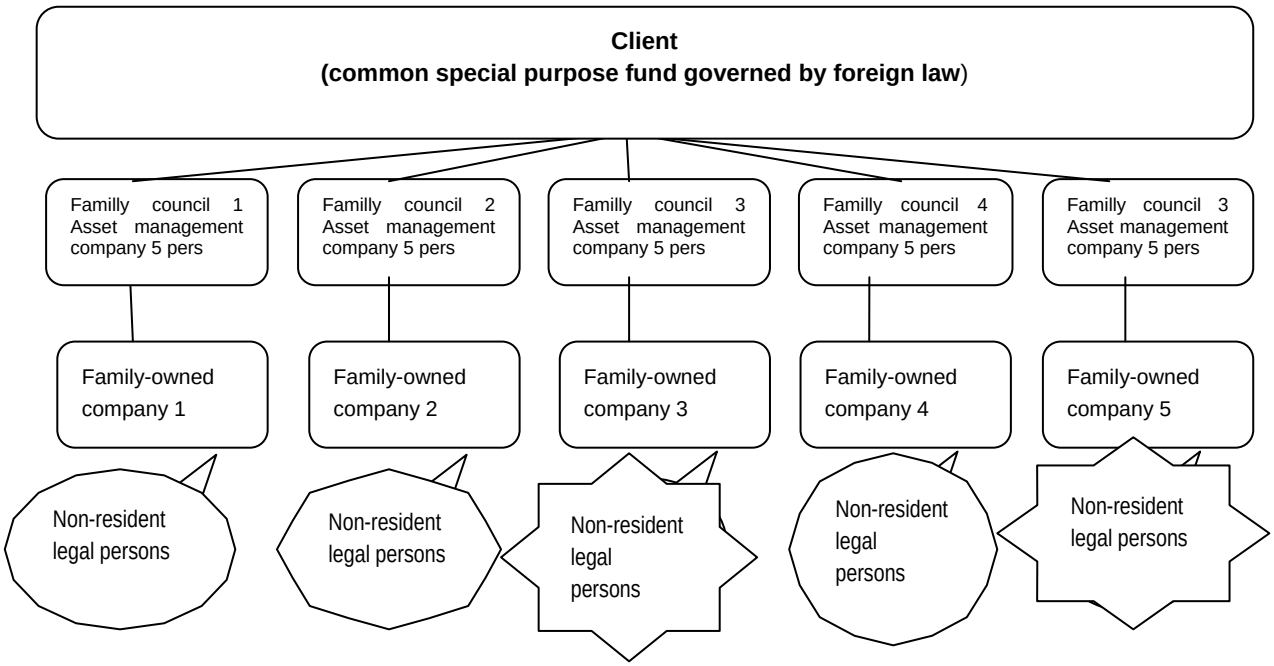
The individuals and beneficiaries of each of its five asset management structures are those natural persons which make up each of the aforementioned family-owned companies.

Each natural person who is a member of a family-owned company holds only, or is expected to hold only, a small percentage of the voting rights attached to the assets transferred to each special purpose fund (less than 5%).

Within each family-owned company, investment decisions are made by five natural persons with acknowledged expertise who meet as a “family council”.

These five asset management structures with a “family council” in turn set up a common special purpose fund governed by foreign law with a view to managing the assets of all five family-owned companies.

This common structure is the client of the professional that falls within the jurisdiction of the *Autorité des Marchés Financiers*.



In this example:

- There are no natural persons meeting the definition of beneficial owner in the sense of a natural person who is destined, by way of a legal act which appointed him/her for the purpose, to hold the voting rights attached to at least 25% of the assets transferred to the special purpose fund governed by foreign law (1° and 3° of Article R.561-3 of the Monetary and Financial Code).

- However, the natural persons who meet as a “family council” within each family-owned company may be considered as the beneficial owners of the common special purpose fund (client) in the sense that they are natural persons who have a power a control over the special purpose fund (Article L.561-2-2

of the Monetary and Financial Code), insofar as the roles of the five "family councils" are known to the professional.

Thus, insofar as the client is a company, a CIS or any other legal person, the professional must understand its ownership and control structure[25] by identifying the beneficial owners and by verifying their identity.

Position
The role of manager does not confer the right to exercise a power of control within the meaning of Articles R.561-1 to R.561-3 of the Monetary and Financial Code.
The professional is not required to systematically identify its client and verify its identity and, as appropriate, that of the beneficial owner(s) each time it conducts a transaction[26].

6. How to meet the ongoing beneficial owner due diligence obligation?

Where the professional has identified the natural persons who meet the definition of beneficial owner by working up the chain of ownership and by taking into account the specific cases referred to in Articles R. 561-1 to R. 561-3 of the Monetary and Financial Code, it must implement its obligation to conduct due diligence, which requires that it take all the reasonable measures to have sufficient and updated knowledge of the beneficial owner(s).

Lawmakers laid down the principle of ongoing beneficial owner due diligence on the basis of the following two distinct operations, conducted either concurrently or successively (I and II of Articles L. 561-5 and R. 561-7 of the Monetary and Financial Code):

- identification
- verification of the identity (of the identifiers collected)

Position
Pursuant to the rules laid down in the French Civil Code, the professional must check the identity of the legal representative when the beneficial owner is a minor or protected adult.

⇒ The identification of the beneficial owner is conducted « by suitable means » and consists of collecting the name(s) and surname(s) of the natural person(s) concerned, and any other information that may help establish his/her (their) identity, in particular his/her (their) date and place of birth. These identifiers may be collected verbally since the associated documents will be retrieved during the identity verification process.

⇒ The verification of the identifiers is made by retrieving all the supporting documents required, according to the risks of money laundering or terrorist financing involved. This verification must be performed using official documents, data and information (for instance a public register) or other independent and reliable sources, as specified by the FATF[27].

Article R.561-7 of the Monetary and Financial Code provides that the professional *"must be able to justify to the AMF that it has conducted due diligence"*[28].

[25] In particular the way in which they operate.
[26] The professional may defer to the identification and verification measures it implemented, unless it has reasons to believe that further verification is required (See Question 6: How to meet the ongoing beneficial owner due diligence requirements ? and Question 8 : When must one identify and check the identification of a beneficial owner ?).
[27] See: Recommendation 10 and its interpretive note.
[28] Private databases containing information on the identity of the beneficial owner(s) are not designed to be a substitute for identification and verification measures, but only to complement the measures introduced by the professional in respect of its due diligence obligations. The same goes for the written statement signed by the client, which shall contain information on the identity of the beneficial owner(s) or an interview report written by the account manager (signed or not by the client) containing in particular information on the beneficial owners that was collected from the said client. At the very last, such documents may be used where there is no suspicion and where the risk is considered low by the professional, provided that such a situation is anticipated in the internal procedures and that the professional can provide justification to the AMF.

In this situation, the professional:

- May have to collect other documents or supporting documents than those referred to in 1° and 2° of Article R.561-5 of the Monetary and Financial Code so as to identify the client, in particular where the customer is a beneficial owner governed by foreign law.

- Must conduct due diligence in accordance with the risk of money laundering and terrorist financing posed by the beneficial owner, pursuant to the situations of risk included in its risk classification which set out the legal risks and the risks specific to the beneficial owner (Article L.561-10-2-I of the Monetary and Financial Code).

Recommendation :
The AMF recommends that where the beneficial owner is a politically exposed person within the meaning of Article R.561-19 of the Monetary and Financial Code, it shall be classified as high-risk.

- Must ensure that the information collected is updated, in particular in the case of high-risk clients.

Thus, the professional must keep a close eye on the events and operations liable to affect the risk level of the client, failing which the latter may get involved in a money laundering scheme.

However, in cases of doubt or questions, for instance when the transactions conducted by a client change substantially and in a way that is inconsistent with the client's business, in particular with the sums usually involved, further identification is required (Article R.561-11 of the Monetary and Financial Code).

7. What are the special requirements for implementing the obligation to identify a beneficial owner and verify its identity?

Lawmakers have set out specific arrangements governing the implementation of the obligation to identify the beneficial owner and verify its identity, which relax or strengthen the arrangements provided for in Articles L.561-5, R.561-5 and R.561-7 of the Monetary and Financial Code described here above. These arrangements particularly take into account the risk of money laundering and terrorist financing, and the professionals must conduct ongoing due diligence throughout the entire business relationship so as to determine whether or not the requirements for applying these specific arrangements are met.

Position
In all cases, it is the duty of the professional to ensure that the criteria set out by lawmakers to modify the due diligence requirements are met all throughout the business relationship.

For this purpose, the professional shall collect the necessary information from its clients, available on official or trade databases or in the publications of the FATF or others, in order to be able to justify to the AMF that it is performing ongoing due diligence.

The statutory provisions are the following (see: annex 1):

- Pursuant to Article R.561-8 of the Monetary and Financial Code, the obligation to identify a beneficial owner and verify its identity is deemed to be fulfilled where the risk of money laundering or terrorist financing is low and where the client of the professional meets the related requirements provided for in the aforementioned Article.
  This includes the beneficial owner(s) of a client which operates as a CIS, management company or asset management company authorised by the competent authority in a Member State of the European Union or by a State party to the European Economic Area agreement or by a third country imposing similar obligations in combating money laundering and terrorist financing. These third countries feature in the list set out in 2° of II of Article L. 561-9 of the Monetary and Financial Code.

- Pursuant to 1° of II of Article R.561-9 of the Monetary and Financial Code, the obligation to identify a beneficial owner and verify its identity is not required where there is no suspicion of money laundering or terrorist financing and for clients and products presenting a low risk and featuring in the list provided for in 1° of Article R.561-15 and in Article R.561-16 of the Monetary and Financial Code. For each client or product, the professional shall collect the information required to determine whether or not the client or product meets the requirements qualifying for exemptions on the due diligence obligation (Article R.561-17 of the Monetary and Financial Code).

- Pursuant to 2° of II of Article R.561-9 of the Monetary and Financial Code and to Order of 27 July 2011[29], the obligation to identify a beneficial owner and verify its identity is not required where there is no suspicion of money laundering or terrorist financing and where the client is one of the persons referred to in 1° to 6° of Article L.561-2 of the Monetary and Financial Code and incorporated, or with its headquarter, in France, in another Member State of the European Union or in one of the countries listed in Order of 27 July 2011[30].

- Pursuant to Article L.561-5 and to 1° and 4° of II of Article R.561-10 of the Monetary and Financial Code, which shall apply concurrently, the obligation to identify and check the identity of the beneficial owner is required for occasional clients:

  - where there is suspicion that the transaction may be associated with a money laundering or terrorist financing scheme
  - or, even where there is no such suspicion, where the amount of the associated transaction(s) exceeds €15,000
  - and, regardless of the amount of the transaction, where it involves the transactions provided for in Article L.561-15 of the Monetary and Financial Code.

- Pursuant to Article L.561-10-2 of the Monetary and Financial Code, the obligation to identify a beneficial owner and verify its identity is subject to more stringent measures[31] where the risk of money laundering or terrorist financing posed by the client, product or transaction is considered high by the professional. It is left at the discretion of the professional to decide whether or not to introduce more stringent measures and it must be able to justify to the AMF at any time that it has conducted due diligence in accordance with the level of risk identified.

- Pursuant to Article L.561-10-2 of the Monetary and Financial Code, the obligation to identify a beneficial owner and verify its identity should receive special attention where it involves the in-depth review of highly complex or unusually large transactions or transactions which have no apparent economic or visible lawful purpose.

- The obligation to identify a beneficial owner and verify its identity is restricted by the provisions of Article R.561-9 of the Monetary and Financial Code where a management company or asset management company allocates units or shares in a CIS under specific conditions laid out in the said Article.

- Lastly, where the client is deemed exposed to specific risks because of the duties[32] performed by a natural person who has been identified as the beneficial owner of a legal person, together with the said client[33], the latter must be subject to additional due diligence measures[34], pursuant to Articles L.561-5, L.561-10-2° and R.561-20 of the Monetary and Financial Code.

[29] Order of 27 July 2011 on the list of third countries imposing similar requirements for combating money laundering and terrorist financing.
[30] Order of 27 July 2011 on the list of third countries imposing similar requirements for combating money laundering and terrorist financing.
[31] Compared to the measures provided for in Article L.561-5 of the Monetary and Financial Code.
[32] Either political, legal or administrative.
[33] See: 1° of III of Article R. 561-18 of the Monetary and Financial Code.
[34] In addition to the measures provided for in Article L.561-5 of the Monetary and Financial Code.

8. When must one identify a beneficial owner and verify its identity?

The Monetary and Financial Code (Article L.561-5) provides for when the identification of a beneficial owner and the verification of its identity should be conducted:

- Before it enters into a business relationship with its client or before assisting the latter in the preparation or completion of a transaction (paragraph 1 of I of Article L.561-5 of the Monetary and Financial Code).

- Before it conducts a transaction for an occasional client:
  - Where there is suspicion that the transaction(s) may be conducted as part of money laundering or terrorist financing scheme (paragraph 2 of I of Article L.561-5 of the Monetary and Financial Code).
  - Even where there is no such suspicion, if the amount of the related transaction(s) exceed(s) €15,000 (1° of II of Article R. 561-10 of the Monetary and Financial Code).
  - Regardless of the amount of the transaction(s), in the cases provided for in Article L.561-15 of the Monetary and Financial Code.

- At the time of entering into the business relationship: it may be possible to postpone the verification of the client's identity and, where appropriate, that of the beneficial owner party to an agreement, to the time when the agreement is being entered into or before the underlying transaction is initiated at the latest, provided that they can justify to the AMF that it is necessary to continue the business relationship initiated and demonstrate the low risk of money laundering and terrorist financing involved (II of Article L.561-5 and 2° of Article R. 561-6 of the Monetary and Financial Code).

- All throughout the business relationship, it is mandatory to update the identifiers collected (ongoing due diligence) in order to update the risk profiles of the beneficial owners in accordance with the risk classification set by the professional. Updating is all the more important as the beneficial owner of the client is a politically exposed person.

- Insofar as appropriate, it may be necessary to carry out a new identification and verification process, in particular where the professional has good reasons to believe that the identifiers previously collected are no longer accurate or relevant. For instance, when the information disseminated in the press or by any other means indicate clearly that the identifiers collected are no longer accurate or relevant (change of majority shareholder in a company in the event of merger/takeover/acquisition) or when the transaction contemplated is not coherent with the profile of the beneficial owner.

  Should the professional use the services of a third-party to apply the due diligence measures[35], it should refer to the « AMF guidelines on the concept of third-party » available on the AMF's website.

9. What to do when it is impossible to identify a beneficial owner ?

Pursuant to Article R.561-6 of the Monetary and Financial Code[36], where it is impossible to identify a beneficial owner and verify its identity, the professional shall not enter into a business relationship with the client and conduct any transaction or he shall, as appropriate, terminate the business relationship that has been previously entered into.

Position
In this case, the professional must determine whether or not it is appropriate to file a suspicious transaction report with TRACFIN on the basis of the information it collected and of its analysis of the situation and, as appropriate, it shall file the said report.

[35] See: I of Article R.561-13 of the Monetary and Financial Code.
[36] Pursuant to Article L. 561-8 of the Monetary and Financial Code.

10. What to do when the identification of a beneficial owner leads to questionable results ?

Pursuant to III and IV of Article L.561-15 of the Monetary and Financial Code, professionals are required to file a report with TRACFIN:

- Where, following the in-depth review provided for in IV of Article L.561-10-2 of the Monetary and Financial Code, doubts remain about the identity of the beneficial owner.

- Where they are confronted with transactions where doubts remain about the identity of the beneficial owner of the client or settlor of a fiducie fund or of any other instrument for managing special purpose funds despite due diligence, pursuant to Article L. 561-5 of the Monetary and Financial Code.

Position
The dubious character can be determined using a risk-based approach. Accordingly, the professional must be able to justify to the AMF the analytical approach that prompted him to implement the due diligence measures.

11. What to do when there is suspicion about a beneficial owner ?

Where there is suspicion about the beneficial owner of the business relationship or transaction, the professional is required to file a report with TRACFIN (Article L.561-15 of the Monetary and Financial Code)[37]. This report must be filed in accordance with the provisions of Article R.561-32 of the aforementioned Code.

12. 12. What to do in the absence of a beneficial owner?

This situation occurs where there is no natural person meeting the definition of beneficial owner within the meaning of Articles L.561-2-2 and R. 561-1 to R. 561-3 of the Monetary and Financial Code.

This may be the case, for example, where no natural person holds more than 25% of the shares or voting rights in a company and exercises a power of control over the management, administrative and governing bodies of the company's general meeting.

In such cases, the beneficial owner due diligence requirements do not apply.

13. How to cope with a "chain of ownership"?

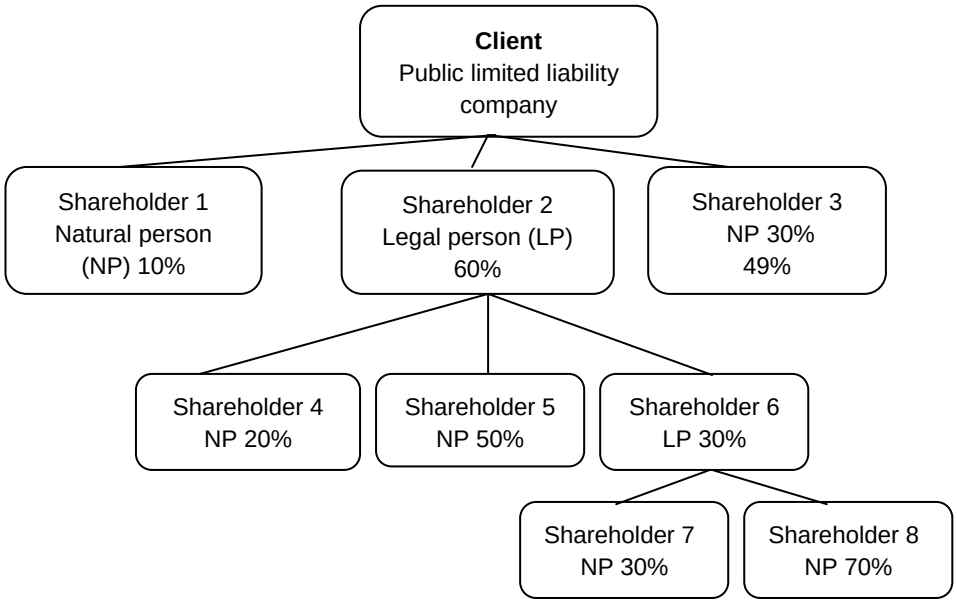
The professional may be confronted with a chain of ownership that needs to be worked up in order to trace back the ultimate natural person(s) meeting the legal and regulatory requirements for a beneficial owner.

Position
Where confronted with a chain of ownership, the professional must look for the natural persons present at each of the levels within the chain and measure for each natural person the percentage of ownership interest or voting rights of the client.

First example
The graph hereinafter illustrates the case of a professional falling within the jurisdiction of the *Autorité des Marchés Financiers* and whose client is a public limited liability company, the capital of which is held by

[37] "AMF Guidelines 2010-23 on the obligation to report suspicious transactions to TRACFIN as part of the fight against money laundering and terrorist financing."

eight individual shareholders or shareholders who are legal persons, spread over three levels in a chain of ownership (one share = one voting right):



In such cases, the professional must pay attention to the individual shareholders present at each level (shareholders 1,3,4,5,7 and 8 in this case) and determine whether or not they meet the beneficial owner requirements laid out in Article R.561-1 of the Monetary and Financial Code.

Search for shareholders meeting the ownership requirement under which an investor must hold less than 25% of the shares or voting rights in the client company:

- level 1:
  - shareholder 1 is not a beneficial owner (a natural person holding directly 10% of the shares in the client company).
  - shareholder 3 is a beneficial owner (a natural person holding directly 30% of the shares in the client company).

- level 2:
  - shareholder 4 is not a beneficial owner (a natural person holding indirectly 12% of the shares in the client company (via shareholder 2 = 60%x20%).
  - shareholder 5 is a beneficial owner (a natural person holding indirectly 30% of the shares in the client company (via shareholder 2 = 60%x50%).
  - shareholder 6 is not a beneficial owner (a natural person holding indirectly 18% of the shares in the client company (via shareholder 2 = 60%x30%).

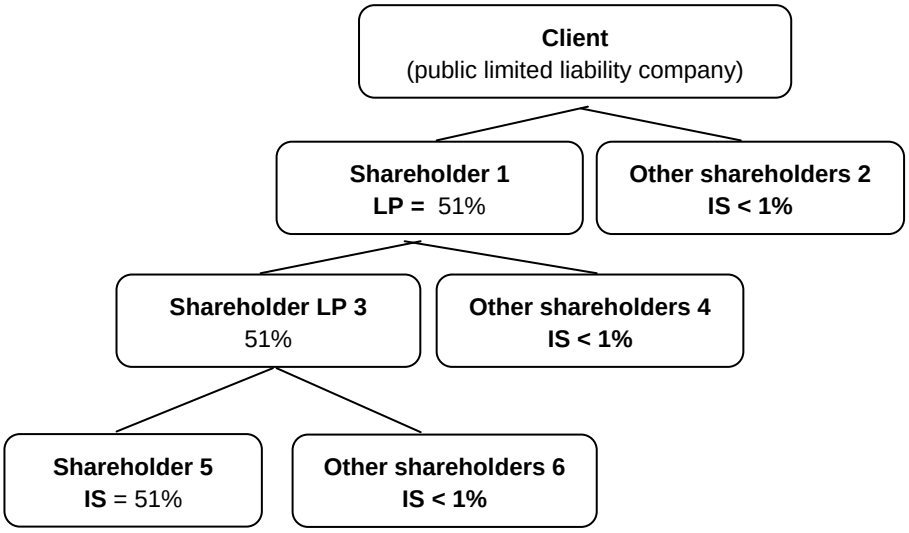
- level 3:
  - shareholders 7 and 8 are not beneficial owners (natural persons holding respectively 5,4% and 12,6% of the shares in the client company)[38].

In the end, two natural persons are beneficial owners (shareholders 3 and 5) insofar as they hold more than 25% of the shares in the company.
The other natural persons do not fall within the definition of beneficial owner unless they exercise, by any other means, a power of control over the management, administrative and governing bodies of the public limited liability company.

[38] 5,4% via shareholders 2 and 6 = (60%x30%30%) and 12,6% via shareholders 2 et 6= (60%x30%x70%).

Second exemple:

The graph hereinafter illustrates the case of a professional falling within the jurisdiction of the *Autorité des Marchés* and whose client is public limited liability company, the capital of which is held by six shareholders, either individual shareholders (IS) or legal persons (LP), spread over three levels in a chain of ownership. The boxes "Other shareholders 2, 4 and 6" refer to diffuse groups of shareholders, not connected with each other (ownership interest held by shareholder lower than 1%)



In such cases, the professional must pay attention to all the individual shareholders present at each level (Shareholders 2, 4, 5, 6) and see whether or not they meet the beneficial owner requirements set forth in Article R.561-1 of the Monetary and Financial Code.

In this specific case, there is no natural person meeting the definition of beneficial owner provided for in Article R. 561-1 of the Monetary and Financial Code in respect with direct or indirect holding of more than 25% of the shares or voting rights in the client company. Indeed, Shareholder 5 holds indirectly, through Shareholders 1 and 3, only 13%[39] of the capital of the client public limited liability company and the "Other shareholders" hold less than 1% each.

However, Shareholder 5 could be considered as meeting the definition of beneficial owner laid out in Article R. 561-1 of the Monetary and Financial Code, in respect of any natural person liable to exercise a power of control by any other means on the management, administrative or governing bodies of the company's general meeting since it:

- holds indirectly 13% of the shares in the client public limited liability company while the other shareholders hold no more than 1%
- and holds a majority stake (51%) in Shareholder 3, which itself holds a majority stake in Shareholder 1 (51%), which itself holds a majority stake in the client public limited liability company.

In the end, there would be one beneficial owner (Shareholder 5) that would be required to perform the client identification and verification obligations.

Third example

The graph hereinafter illustrates the case of a professional falling within the competence of the *Autorité des Marchés Financiers* and whose client is public limited liability company, the capital of which is held by six shareholders, either individual shareholders (IS) or legal persons (LP), spread over two levels in a chain of ownership:

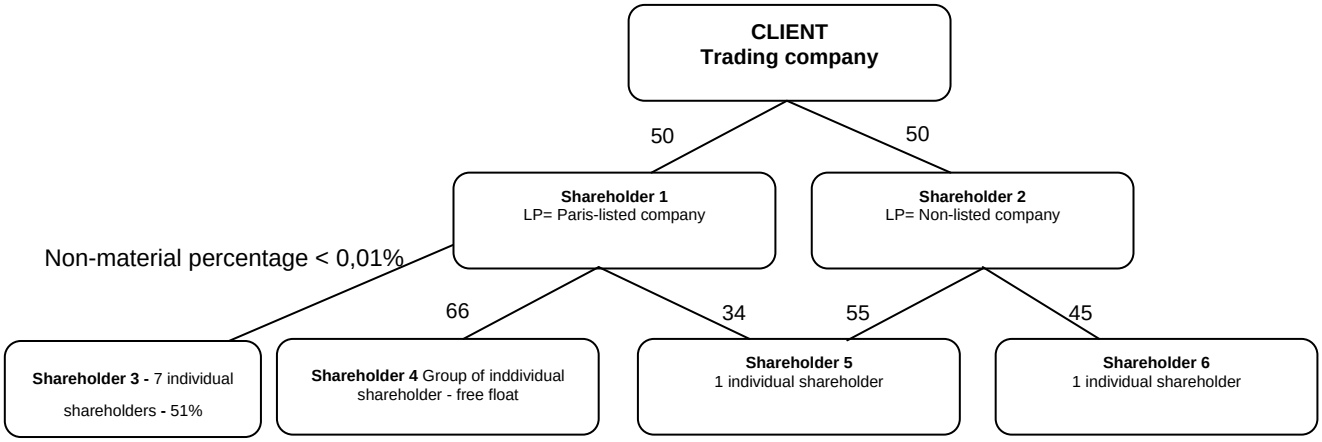
[39] 51%x 51%x51% = 13,2%.

The first level features:

- Two companies, one of which has its securities admitted to trading on a French regulated market and with a free float accounting for 66% of all the capital. This free float is dispersed amongst many shareholders who individually hold only a tiny fraction of it.

The second level features several shareholders, spread as follows:

- Assumedly, there is no person exercising a power of control over the management, administrative or governing bodies of the client company's general assembly.



Since the client is a company, the criteria which must be taken into consideration are those provided for in Article R.561-1 of the Monetary and Financial Code.

The shareholders 3, 4, 5 and 6 are natural persons for whom it should be determined whether or not they are beneficial owners within the meaning of the aforementioned Article.

Search for shareholders meeting the criteria of a holding exceeding 25% of the capital of a client:

⇒ Shareholder 3 (7 individual directors) does not meet the definition of beneficial owner (indirect holding of a non-material fraction of the client company's capital through Shareholder 1)

⇒ Shareholder 4 (free float) may meet the definition of beneficial owner (indirect holding of 33% [50%+66%] of the client company's capital through shareholder 1), but it is a group of shareholders holding individually only a tiny fraction of the client's capital.

⇒ <u>Shareholder 5 is a beneficial owner</u> (indirectly holds 44.5% of the client's capital):

- it holds indirectly 27,5% (50% x 55%) of the client's capital (through the non-listed company). Accordingly, it shall be identified as such.

- It holds indirectly 17% (50% x 34%) of the client's capital (through the listed company). However, provided that the client or beneficial owner(s) is (are) not suspected of money laundering or terrorist financing, the beneficial owner(s) of a listed company (Shareholder 1) are required to perform the client identification and verification obligations provided for in Articles L.561-5, II of Article L.561-9 and b) of 1° of Article R.561-15 of the Monetary and Financial Code.

⇒ Shareholder 6 holds indirectly 22.5% (50% x 45%) of the client's capital through Shareholder 2. Thus, shareholder 6 is not a beneficial owner (holds less than 25% of the client's capital).

In the end, assumedly, since there is no person exercising a power of control within the meaning of Article R.561-1 of the Monetary and Financial Code, only Shareholder 5 should be subject to the identification and verification procedures, provided that that there is no suspicion of money laundering or terrorist financing.

14. What are the obligations for keeping records of the identification documents and verifying the identity of a beneficial owner ?

These obligations are laid down in Articles L.561-12 and R.561-7 of the Monetary and Financial Code, which provide that the professional must keep records of the following documents, unless more stringent provisions exist:

- The documents on the identity of their usual or occasional clients (where appropriate, the beneficial owners of the business relationship) for five years as of the close of their account or as of the termination of their business relationships with the said clients.

- Within the limit of their responsibilities, the documents on the transactions completed by their clients for a period of five years as of their execution.

- Pursuant to Article R.561-22 of the same Code, the outcome of the in-depth review provided for in II of Article L. 561-10-2 of the Monetary and Financial Code must be documented and kept for five years, within the limit of the responsibilities of the professionals.
  Relevant information on how to meet this obligation can be found in the *"AMF Guidelines on combating money laundering and terrorist financing"* on the AMF's website.

- The papers and documents related to the reports filed with TRACFIN for five years after the end of the business relationship involving a beneficial owner or several beneficial owners. This record-keeping obligation applies particularly to the documents referred to in the *"AMF Guidelines 2010-23 on TRACFIN reporting requirements"* available on the AMF's website.

Article R.561-12 of the aforementioned Code stipulates that the customer due diligence requirements apply throughout the entire business relationship, in compliance with the principle of proportionality: *"Collecting and keeping the information related to client due diligence must be performed in line with the objectives for the risk assessment of money laundering and terrorist financing and with the surveillance objectives."*

Position
The documents kept must allow professionals to respond promptly to the requests for information from the AMF in order to help it perform its duties or justify to it that due diligence was conducted in line with the risks identified.

The AMF General Regulation stipulates that professionals must set criteria for the record-keeping of the information and documents required in their internal procedures in order to comply with the provisions on combating money laundering and terrorist financing.

Thus, for asset management companies, management companies, real estate investment funds, forestry savings companies, special purpose vehicle management companies and investment services advisers, the AMF General Regulation :

- Provides additional information on this issue and requires explicitly that the supporting documents and reports related to the transactions referred to in Article L.561-15 of the Monetary and Financial Code be maintained (suspicious transaction reports)

- Provides that the information required for the application of Article L.561-34 of the Monetary and Financial Code be kept (groups with branches/subsidiaries abroad).

The AMF recalls that the record-keeping procedures must ensure compliance with the following requirements:

- The protection of private data[40]
- Professional secrecy and confidentiality of the suspicious transaction reports[41].

Recommendation
The AMF recommends that professionals ensure that client files are compliant and updated on a regular basis, irrespective of the client's seniority, and verify that the suspicious transaction reports are not included in the said files.

15. What internal control procedures arise from the obligation to identify a beneficial owner and verify its identity?

With regard to combating money laundering and terrorist financing, professionals must review on an ongoing or periodical basis whether or not the beneficial owner requirements are complied with. They shall write and update the related procedures in the AMF General Regulation.

They must be able to justify to the AMF that the said control procedures are consistent with their risk-based approach.

Position
It is vital that the traceability of controls be performed in compliance with the procedures in order to demonstrate their existence (date, actors, outcome, follow-up…).
In particular, procedures aimed at controlling the information related to the beneficial owners of legal persons and arrangements must help avert and prevent money laundering and terrorist financing transactions.

16. What are the requirements governing the reporting of a suspicious transaction to TRACFIN?

These requirements are dealt with in the *"AMF Guidelines 2010-23 on TRACFIN reporting requirements".* However, it is recalled that:

- Paragraph IV of Article L.561-15 of the Monetary and Financial Code provides for mandatory reporting of *"any transaction in respect of which the identity of the principal or of the beneficiary owner or of the grantor of a fiduciary fund or of any other management instrument of a special-purpose trust remains dubious despite the steps taken pursuant to Article L.561-5."*

- Article R.561-14 of the Monetary and Financial Code requires that a professional who terminates a business relationship with a client pursuant to Article L.561-8 of the Monetary and Financial Code file a report with TRACFIN as appropriate.

- Article L.561-19 of the Monetary and Financial Code provides that suspicious transaction reports filed with TRACFIN be confidential, without prejudice to the provisions of the aforementioned Article. Thus, professionals are not allowed, under pain of the sanctions, to draw to the attention of the owner of the sums, the originator of one of the transactions or to third parties.

[40] See : single authorisation AU-003 available on the CNIL's website : Deliberation 2011-180 of 06/16/2011 authorising the processing of private data by financial bodies in combating money laundering and terrorist financing and in imposing financial sanctions.
[41] see: in particular articles L.561-19 to L.561-21 of the Monetary and Financial Code.

This document includes an annex which is available via the “Annexes and links” tab.

Annex - The main beneficial owner identification and verification obligations