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BENEFICIAL OWNER CENTRAL REGISTRY AS A TOOL TO FIGHT MONEY LAUNDERING AND TERRORIST FINANCING

Abstract

This article deals with the effect of the central registry of beneficial owners in terms of money laundering and terrorist financing. The main purpose of the article is to provide a comprehensive overview of the functioning of central registries of beneficial owners both at the national and European levels. The author focuses mainly on the issue of the European Central Platform as well as on the Centralized Registry of Bank Accounts. This article aims to confirm or refute the hypothesis that the current legislation is insufficient and that the established legal framework has certain gaps that may affect the original intent and goals of the central registry of beneficial owners. Within the application issues, we also deal in more detail with the question of whether the central registry of beneficial owners can be seen as reliable and whether it contains up-to-date information/.

Key words: AML, UBO, central registries of beneficial owners.

JEL Classification: K34

1. Introduction

Following the disclosure of the Panama Papers in 2016, the general public gained an overview of how complex organizational structures of legal entities can be used to cover illegal financial income. The Panama Papers motivated the Financial Action Task Force (the

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'FATF') to call on its members to step up their efforts and focus on increasing transparency concerning the provision of information on the beneficial ownership of legal entities [Davila, Barron, Law 2019: 11-15]. Finally, combined with various political pressures at international and national levels, several countries have committed themselves to establish registries of beneficial owners on their territory.

Although complex legal entity ownership structures can serve legitimate purposes, the complexity of schemes can easily be misused to conceal the income or interests of some people who do not want to be 'visible'. Complex legal entity ownership structures can raise suspicions about the legitimacy of such a structure, especially in the case of a jurisdiction that is associated with a high risk of money laundering[1].

In this regard, the European Union (the 'EU') has adopted the 4th and 5th AML Directives, which—inter alia—increase transparency and increase access to beneficial ownership information through the establishment of national central registries. The EU intended to create a common space containing all the information required to identify beneficial owners, which will be accessible to both EU Member States and third countries. The technical solution of the national registries' systems was left to the discretion of the Member States in line with the principle of technology neutrality. One of the key requirements is the possibility of interconnecting these registries with the European Central Platform.

However, it is important to realize that the functionality or benefits of beneficial owner registries depend above all on the timeliness and accuracy of the information contained therein. If beneficial ownership information is inaccurate, it becomes unreliable and even harmful. All of this may ultimately weaken the FATF's original call for greater transparency.

2. Legal Regulation of Beneficial Ownership Vis-aVis 4th and 5th AML Directives and FATF Recommendations

2.1. Beneficial Owner Definition under FATF Recommendations

Under FATF Recommendations (the 'FATF RN'), the term 'Beneficial Owner' means any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least. This term also includes persons who effectively control or exercise control over a legal entity. **Effective ownership** means ownership or control that is exercised through a chain

[1] For more information on ways to conceal the identity of beneficial owners, see [Hatchard 2019: 189-197].

of ownership or indirect control. At the same time, the FATF RN emphasizes the need to apply the above definition to the beneficial owner of income from life or investment insurance [FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 2012: 117].

It is necessary to distinguish between the terms ownership and control. Regarding **ownership**, individuals and legal entities own a legal entity under the legal regulations applicable in that state. On the other hand, control is linked to the power of taking relevant decisions within a legal entity and participating in the adoption of specific actions, such as the owner of a control package [FATF Guidance on Transparency and Beneficial Ownership 2014: 8]. The definition of a beneficial owner goes beyond the legal ownership of a legal entity and emphasizes the need to examine the chains of ownership and control that are in fact exercised over a legal entity. Thus, these are not the owners listed officially, but the existing indirect owners of a legal entity.

The second part of the definition applies to the **individual on whose behalf the transaction takes place**. According to Transparency and Beneficial Ownership (the 'FATF BO'), the definition also applies to cases where a natural person does not control or exercise control over the customer. This part of the definition is aimed at natural persons who—based on precisely structured transactions—want to 'avoid' their association with effective ownership or control over the customer but at the same time wish to retain the benefits of such a transaction [FATF Guidance on Transparency and Beneficial Ownership 2014: 9].

The identification of Beneficial Ownership is conducted by obtaining specific information [FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 2012: 65-66], mainly:

- The amount of the share of ownership interest in the legal entity;
- A natural person exercising control over a legal entity if the ownership interest is uncertain;
- A natural person who holds the position of a senior manager if organizational control is uncertain.

FATF RN emphasizes that the threshold for determining ownership interest may be, for example, a share above 25% [FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 2012: 92]. The threshold set above 25% may have the opposite effect, namely the concealment of beneficial ownership using different structures of entities owning or controlling the legal entity.

Following up on the definition above, the FATF RN elaborates on the issue of **transparency** concerning the beneficial ownership of a legal entity. For the purposes of applying the FATF RN, any other entity, that is not a natural person and that has entered into a business relationship with a financial institution or otherwise owns assets, is also considered a legal entity. At the same time, possible examples include foundations, associations, or other entities that have legal personality [FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 2012: 125]. As this is not an exhaustive definition of legal entities, Recommendation 24 of the FATF RN can be applied to other types of legal entities not included therein.

Recommendation 24 of the FATF RN points out in more detail the comprehensive measures to be taken in the field of combating money laundering and terrorist financing. In particular, with foundations and limited liability companies, the FATF emphasizes the need to apply similar measures and to comply with the requirements applicable in that country, taking into account the form and structure of the legal entity [FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 2012: 94].

The measures taken in relation to legal entities must follow up on the application of the risk-based approach (the 'RBA Approach'). In applying the RBA Approach, it is necessary to take into account the types, forms, and structures of legal entities as well as the existence of the risk of money laundering and terrorist financing in connection therewith. Based on the level of risk thus determined, it is then possible to produce measures to achieve an adequate level of transparency. It follows from that above that the FATF RN emphasizes the need to provide for due access to such information by competent authorities [FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 2012: 94].

The definition of the concept of beneficial ownership is similarly applied in relation to other legal arrangements (the so-called legal arrangements). Legal arrangements apply to trusts and similar legal personalities (e.g. Treuhand) [FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 2012: 125]. The method of identifying beneficial ownership in connection with trusts is further described in FATF RN [FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 2012: 66]. A trust authorizes a single individual to manage assets on behalf of another individual. Trusts usually do not have legal personality, and they cannot own property and carry out transactions on their own but only through their trustees [Daudrikh 2018: 27-32]. In this case, however, identifying the

beneficial owner is a bit more complicated in practice. For example, in some countries, it is possible for the founder, the beneficiary, and the trustee to be the same person [FATF Guidance on Transparency and Beneficial Ownership 2014: 9].

2.2. Beneficial Owner Definition under 4th AML Directive

While the FATF RN uses the term beneficial owner, the 4th AML Directive uses the term Ultimate Beneficial Owner (the 'UBO'). The definition of UBO set out in the 4th AML Directive reflects the FATF RN guideline. In essence, it is a similar definition, which includes a list of potential beneficial owners. Thus, it does not provide an exhaustive list of individuals but rather an illustrative list of possible UBOs. The revised list divides UBOs into business entities and trust management entities.

With **business entities, the beneficial owner is an individual who effectively owns or controls that legal entity**. Ownership or control is assessed for the percentage of shares or voting rights or ownership interest in that entity. Ownership can be direct or indirect [Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament andthe Council, and repealing Directive 2005/60/EC of the European Parliament and the Council and Commission Directive 2006/70/EC, Art 2 (2) (i)]. Direct ownership is indicated when an individual owns 25% plus one share or has an ownership interest of more than 25% in the customer. Indirect ownership is indicated when an individual exercises control over a legal entity that is equivalent to the same share or the same ratio of ownership interest as is the case with direct ownership.

The correctness and appropriateness of setting a threshold of 25% raise a major question mark. According to an analysis by Transparency International, EU Member States are considering applying a lower percentage to identify ownership or control, taking into account each country's legal framework and risk level [Van der Merwe 2020: 9]. The threshold does not provide for accurate and reliable identification of all UBOs.

In the context above, the 5th AML Directive added a provision on the Commission's exclusive right—following an assessment of all applicable recommendations set out by international authorities and competent institutions—to submit a report to the European Parliament of the Council assessing the need and adequacy of **reducing the percentage threshold** for indicating ownership and control over a customer [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU)

2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (41) (IIIa)]. Nevertheless, the question arises as to whether setting precise thresholds does not allow entities to remain anonymous, as they can formally circumvent the rules and thus avoid disclosing their identities. In that regard, the 4th AML Directive recognizes the fact that the identification of ownership by holding a fixed percentage of shares does not in itself automatically mean the identification of beneficial ownership, but it is one of several factors to be taken into account. It is therefore up to the Member States to accept or reduce the threshold [Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, Recital 12)]. In addition, the competent authorities should be left with the power to classify a person as a beneficial owner who does not meet a certain limit (i.e. has a lower percentage of shares) if warnings or risks arising from such a relationship exist [Votava, Jeanne, Hauch, Clementucci 2018: 30].

The 4th AML Directive also addresses the situation **where it is not possible to identify a beneficial owner** using the criteria above. In this case, the **beneficial owner is the individual who holds the position of a senior manager**. At the same time, the obliged entity must keep records of the measures taken, serving as evidence that the obliged entity has exhausted all possible means to identify the beneficial owner according to the shares or ownership interest percentages in the customer. This provision can also be applied in case of doubt as to whether the person identified is a UBO [Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, Art 3 (6) (ii)].

The 5th AML Directive has supplemented the list of UBOs **that manage trusts**. The list contains several entities having different positions in the overall structure of the entrusted property management, in particular, the founder, trustee, protector, and beneficiary [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for

the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (2)].

2.3. Slovak Republic Definition of Beneficial Owner

In comparison with the definitions of the term, UBO stipulated in the FATF Recommendations and the 4th AML Directive, Act 297/2008 Coll., Protection Against Money Laundering and Protection Against Terrorist Financing and Amendments to Certain Acts (the 'Money Laundering Act'), opted for a different classification of individuals meeting the characteristics of a UBO.

In general, any natural person who effectively (i.e. in practice, not just on paper) participates in the business, management, or control of a legal entity, a natural person (entrepreneur), or pool of assets, and any natural person for whose benefit these entities perform their operations or businesses [Financial Intelligence Unit, Beneficial Owner. Opinion from the perspective of Sections 6a and 10a of Act 297/2008 Coll.: 1] Subsequently, the Money Laundering Act stipulates—in an illustrative manner and depending on the status of a natural person—what natural persons can be seen as UBOs.

With **business entities**, the direct and indirect share of a natural person[2] in a legal entity is assessed. The share of their sum must represent at least 25% of the voting rights in the legal entity or its registered capital, including bearer shares. Subsequent conditions given in the Money Laundering Act set forth the more detailed identification features of a UBO. For instance, a natural person who has the right to appoint or otherwise nominate or remove any or all members of the management or supervisory board in a legal entity, control a legal entity in another way or has the right to the economic benefit of at least 25% of the proceeds of the legal entity [Act 297/2008 Coll., Protection Against Money Laundering and Protection Against Terrorist Financing and Amendments to Certain Acts, Section 6 (1) (a)].

With **natural person (entrepreneur)**, a natural person is a UBO if they have the right to the economic benefit of at least 25% from the business of a natural person (entrepreneur) or their other operations [Act 297/2008 Coll., Protection Against Money Laundering and Protection Against Terrorist Financing and Amendments to Certain Acts, Section 6 (1) (b)].

The last-mentioned alternative is the **pool of assets**. Under the Money Laundering Act, the pool of assets means foundations, non-profit organizations rendering services of general

[2] For more details on the determination of the indirect share, see [Act 595/2003 Coll, Income Tax, Section 2 (o)].

interest, non-investment fund, or another special-purpose pool of assets that manages and distributes funds [Act 297/2008 Coll., Protection Against Money Laundering and Protection Against Terrorist Financing and Amendments to Certain Acts, Section 9 (e)]. In this case, a UBO is a natural person who is—for instance—founder or organizer of a pool of assets, has the right to appoint, otherwise nominate or remove any or all members of the management, is a member of the management or board of directors, is a beneficiary of at least 25% of the funds generated by a pool of assets if future beneficiaries of these funds were identified, and the like [Act 297/2008 Coll., Protection Against Money Laundering and Protection Against Terrorist Financing and Amendments to Certain Acts, Section 6 (1) (c)].

In conjunction with the 4th AML Directive, the Money Laundering Act also addresses the absence of a natural person who meets the UBO criteria above. In this case, a UBO is a **member of senior management**, such as the Board of Directors of any tier or members thereof. The extent of the senior management members may be supplemented depending on the type of the obliged entity. For instance, if a bank is an obliged entity, the senior management also includes the senior manager, the member of the management, or the board member [National Bank of Slovakia. National Bank of Slovakia Guideline #3/2019 from 29 April 2019—Financial Market Supervision Division—on the Protection of a Bank and a Branch of a Foreign Bank Against Money Laundering and Terrorist Financing, Art. 8 (10)].

Compared to the FATF Recommendations and the 4th AML Directive, the Money Laundering Act is more strict and in more detail stipulates the features of UBOs, which in contrast to the general regulation contained in the FATF Recommendations and the 4th AML Directive provides a better understanding of the UBO term. More detailed regulation of the UBO concept also follows up on the existence of various national central registries of UBOs, i.e. the information wherein they are classified into their legal forms.

3. National Central Registries of UBOs

3.1. 4th & 5th AML Directive-Related Principles of National Central Registries of UBOs

The Member States are required to keep all obtained UBO information in the national central registries of UBOs (the 'NCR'). The Information required relates to the beneficial ownership and details of the shares held by Beneficial Owners. [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU)

2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (15)]. The list of information on trustees explicitly disclosed to their administration is further detailed in Art 1 (16) (a) of the 5th AML Directive.

The aim of setting up an NCR is to facilitate cooperation in the exchange of information between the EU Member States by providing that the individual registries are directly linked through the EU Platform. NCRs must have reliable information and verification mechanisms to provide for the accuracy of the information listed therein.

The 4th and 5th AML Directives focus on the regulation of specific NCR areas.

- **NCR Applicability**. With **legal entities**, the beneficiary ownership's information must be kept by the NCR of the legal entity's home Member State. **With trusts or entities with similar legal arrangements**, the relevant NCR is the one that seats in the Member State in which the trust manager or a person holding an equivalent position in a similar legal arrangement (both the 'Trustee') has its residence of headquarters. If the Trustee resides or is headquartered outside the territory of the EU, the Member State in which the Trustee enters into a business relationship or acquires assets on behalf of the trust or entity with a similar legal arrangement. The 5th AML Directive also takes into account the plurality of Trustees' residences in the Member States or the establishment of several business relationships in another Member States. In the case above, a deed of registration or an excerpt from the NCR of the relevant Member State containing information on the property rights [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1(16) (c)].
- **Access to NCR Information**. The original 4th AML Directive allowed the information listed in the NCR to be disclosed to **entities with a 'legitimate interest'**. Unrestricted access was granted to supervisory authorities. Some minimum information on beneficial ownership also used to be disclosed to any person or organization who showed a legitimate interest. In essence, it was still a matter of protecting the privacy and personal data of beneficial owners. However, this approach was often criticized by experts and caused several different problems when the authorized subjects wanted to obtain information [Oravcová 2015: 124-126].

The 5th AML Directive modified wording also allowed the disclosure of beneficial ownership information to the **public**. However, it is not a question of making all the information available but only of a certain set of data of a general nature. The reason is the protection of the privacy of the beneficial owners as well as the associated risk of damages. In implementing this standard, the European legislator assumed that the availability of information on beneficial owners would provide for greater transparency of transactions and allow civic associations and media to exercise control over financial market transactions [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Recital 34-36]. Unrestricted access is still left to the Financial Intelligence Unit (the 'FIU'), competent authorities[3], and obliged entities for exercising general mandatory due diligence vis-a-vis customers.

The 5th AML Directive emphasized the need to enforce transparency of trade relations. At the same time, it emphasized the need to comply with all the rules concerning the protection of privacy and personal data, which require a clear distinction between the categories of legal entities performing the management of entrusted assets as their principal business [Buznová, Leskovský 2017: 12]. With regard to **trust or entity with a similar legal arrangement**, unrestricted access to information similarly applies to FIUs and obliged entities for exercising general mandatory due diligence vis-a-vis the customer. However, with trust, the information above **is not disclosed to the general public**. The 5th AML Directive limits the range of authorized entities and allows the disclosure of information to natural persons who can show a legitimate interest. The definition of a legitimate interest is governed by the law of the Trustee home Member State. [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending

[3] Competent authorities are defined as: "*Competent authorities granted access to the central register referred to in paragraph 3a shall be public authorities with designated responsibilities for combating money laundering or terrorist financing, as well as tax authorities, supervisors of obliged entities and authorities that have the function of investigating or prosecuting money laundering, associated predicate offences and terrorist financing, tracing, and seizing or freezing and confiscating criminal assets*" [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (15) (e) and Art 1 (16) (d)].

Directives 2009/138/EC and 2013/36/EU, Recital 41] For the information to be disclosed to a natural or legal entity, it has to submit a written request and meet the conditions regarding the shares or ownership insofar as it would allow the entity to render control over a company or other legal entity[4].

Access to all or part of the information contained in the NCR **may be restricted** vis-a-vis obliged entities, the general public, a natural entity with a legitimate interest, or any natural or legal entity who submits a written request and holds or owns a controlling interest in a corporate or other legal entity, provided that there is a disproportionate risk associated with the fraud, kidnapping, extortion, violence, and the like. An exemption can only be granted based on a prior assessment of such extraordinary circumstances. Restrictions do not apply to credit and financial institutions, nor to obliged entities[5] who are public officials [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art (1) (16) (h)].

- **Discrepancies in NCR Information Disclosures**. For the effectiveness of the NCR, the 5th AML Directive requires the information held in the NCR to be updated, accurate, and adequate. To this end, it is mandatory for the competent authorities and obliged entities to report any irregularities they find between the information disclosed in the NCR and those available to them. [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC

[4] Natural and legal entities must meet the following requirements: "*any natural or legal person that files a written request in relation to a trust or similar legal arrangement which holds or owns a controlling interest in any corporate or other legal entity other than those referred to in Article 30 (1), through direct or indirect ownership, including through bearer shareholdings, or through control via other means.*"[Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art (1) (16) (d)].

[5] Under Art 2 (1) (b) of the 5th AML Directive, obliged entities are: *notaries and other independent legal professionals, where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction or by assisting in the planning or carrying out of transactions for their client concerning the:*
i) buying and selling of real property or business entities;
(ii) managing of client money, securities or other assets;
(iii) opening or management of bank, savings or securities accounts;
(iv) organization of contributions necessary for the creation, operation or management of companies;
(v) creation, operation or management of trusts, companies, foundations,
or similar structures".

and 2013/36/EU, Art 1 (16) (f)]. Under the explanatory memorandum of the draft amendment to the Money Laundering Act, obliged entities shall always notify the NCR of the current identification information on the beneficial owner. Thus, if a discrepancy is found between the information obtained by the obliged entity and the NCR, the obliged person shall make every effort to fix that. The obliged entity shall communicate with the customer to find out whether it is the correct information and then request a correction of the listing in the registry. Otherwise, the obliged entity shall inform the relevant registry [Explanatory Memorandum to the Draft Amendment to Act 297/2008 Coll., Protection Against Money Laundering and Protection Against Terrorist Financing and Amendments to Certain Acts].

Obliged entities shall request not only from legal entities but also from other similar institutions (foundation, non-profit organization) a certificate of registration or excerpt from the relevant registry or records.

- **NCR Access Fee Introduction**. The Member States may decide to introduce fees or online registration to access the information available in the NCR. If fees are introduced, they may not exceed the administrative costs, including the costs of maintaining and updating the registry [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (15) (d)]. However, information should be disclosed without any fees to the FIU and the competent authorities.
- **Access of FIU & Competent Authorities**. The Member States are required to provide due and unrestricted access to the information disclosed in the NCR for FIUs and competent authorities [G20 High-Level Principles on Beneficial Ownership Transparency 2014]. Access to the information must be implemented in a timely manner. [Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, Art 30 (2)]. [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of

money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (15) (e)].

A similar recommendation can also be found in the FATF RN, which, however, speaks only of the possibility for competent authorities to obtain or have timely access to accurate and up-to-date information on the effective ownership and control of a legal entity [FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation 2012: 94]. In this case, the FATF RN does not directly guarantee the competent authorities access to the required information and leaves the provision of a specific mechanism to achieve this objective to the acceding countries.

3.2. Principles of Slovak Republic Beneficiary Owner National Central Registry

The UBO term definition above set out in the Money Laundering Act, states the need to identify UBOs, however, at the same time, it does not provide for the obligation to register a UBO with the relevant registry. The registration of UBO data on the territory of the Slovak Republic is currently performed according to the following criteria:

- With a **legal entity that is not a public administration authority or an issuer of securities admitted to trading on a regulated market**, UBO data shall be entered in the **Commercial Registry** [Registration of beneficial ownership data with the SR CR];
- With **pools of assets**[6]: **for foundations**, the Ministry of Interior of the Slovak Republic, Public Administration Section, General Internal Administration Department; for **non-investment funds**, district office in the seat of the region where the non-investment fund is headquartered; for **non-profit organizations rendering services of general interest**, district office in the seat of the region where the non-profit organization is headquartered [Recommendation on the registration of the beneficial owner for foundations, non-investment funds, and non-profit organizations rendering services of general interest];
- With a **public sector partner**, the UBO data are entered in the **Registry of Public Sector Partners**.

The legal regulation governing the registration of UBO data into the **Commercial Registry** is further regulated in Act 530/2003 Coll., Commercial Registry Regulation (current

[6] For a definition of the term pool of assets, see [Act 297/2008 Coll, Protection Against Money Laundering and Protection Against Terrorist Financing and Amendments to Certain Acts, Section 9 (e)].

version) (the 'CR'). The duty to register UBO data applies to several legal entities, such as a joint-stock company, a commodity company, a European company, and the like [of Act 530/2003 Coll., Commercial Registry Regulation (current version), Section 27 (2)].

In order to register UBO identification data, the registered person has to submit the following **data**: first name, last name, birth number or date of birth if they have no birth number, address of permanent residence, or another residence (the address where they reside), nationality, type and number of the identity document, and the data that establishes the UBO position under a special regulation [Registration of beneficial ownership data with the SR CR].

An identity card, passport, and the like mean the identity document. The data that established the UBO position under a special regulation—which is the Money Laundering Act—is the indication of the form of ownership (direct and indirect ownership), or UBOs are the members of the senior management [Act 297/2008 Coll., Protection Against Money Laundering and Protection Against Terrorist Financing and Amendments to Certain Acts, Section 7].

Unrestricted access to data contained in the Commercial Registry is given to obliged entities, supervisory authorities (National Bank of Slovakia and the FIU), as well other authorized entities, such as law enforcement authorities or state tax/fees/customs administration authorities [Act 297/2008 Coll., Protection Against Money Laundering and Protection Against Terrorist Financing and Amendments to Certain Acts, Section 10a].

In relation to the **public**, UBO data are not publicly available on the website of the Commercial Registry, in the Commercial Gazette, or Commercial Registry excerpts [Registration of beneficial ownership data with the SR CR]. This leads to the issue of compliance with the basic objective of the 5th AML Directive, which in its preamble states the importance of disclosure of such information to the general public, as well as the establishment of clear rules on public access [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Recital 33]. It follows from the above that the access to UBO data disclosed in the CR does not appear to be in line with the principle of transparency required by the EU.

The legal regulation of the registration of UBO identification data in the **relevant pools of assets** registries is contained in several legal regulations and depends on the type of the pool of assets [Act 34/2002 Coll., Foundations Regulation and Amendment of the Civil

Code as amended, Act 213/1997 Coll., Non-Profit Organizations Rendering Services of General Interest as amended, Act 147/1997 Coll., Non-Investment Funds and Amendment to the Slovak Republic National Council Act 207/1996 as amended]. It is important to note that UBO is identified by whether the founder or organizer of the organization is a natural person or legal entity. Thus, different criteria are applied for the identification of UBOs [Recommendation on the registration of the beneficial owner for foundations, non-investment funds, and non-profit organizations rendering services of general interest]. The content of the mandatory UBO data is the same as for UBO registration with the CR. The definition of entities is also regulated to which unrestricted data access applies.

The legal regulation of the registration of UBO identification data with the **Registry of Public Sector Partners** (the 'RGPR') is regulated in Act 315/2016 Coll., Registry of Public Sector Partners (current version). The administration and operation of RGPR are done by the Ministry of Justice of the Slovak Republic, while the registration with RGPR is done by the Žilina District Court.

Compared to the registration with the CR, the application for registration with the RGPR is submitted by an **authorized person** on behalf of the public sector partner. When identifying UBO, the authorized person has the duty to act impartially and exercise due diligence. To obtain the necessary information and documentation, the public sector partner has the duty to provide synergy. The authorized person has no duty to observe the instructions of the public sector partner [Act 315/2016 Coll., Registry of Public Sector Partners (current version), Section 11 (5)].

UBO identification is supported by a **verification document** [Act 315/2016 Coll., Registry of Public Sector Partners, Section 11 (6)]. The competent authority shall issue an electronic confirmation of the registration with the RGPR, and from there it is forwarded to the authorized person. The authorized person listed in the registry and the public sector partner are liable for the accuracy of the UBO information [Act 315/2016 Coll., Registry of Public Sector Partners (current version) Section 11 (1)].

4. European Central Platform

The Member States are required to interconnect the NCR with the European Central Platform. The interconnection of Member States' NCRs requires the integration of national systems mainly because of the different technical characteristics of their systems. The integration of NCRs shall be implemented in accordance with the adopted implementing act of the Commission, which shall further specify the technical specification and

procedures for the interconnection of NCRs [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Recital 37 and Art 1 (15) (g)].

The technical solution of the platform is divided into three levels:

1. European e-Justice Portal (the 'EJP');
2. European Central Platform (the 'ECP');
3. NCR.

The registry integration system consists of NCR, ECP, and the European Electronic Access Point Portal [Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, Art 22 (2)]. The Beneficial Ownership Registers Interconnection System (the 'BORIS') is a decentralized system designed to connect NCRs and EJPs through the ECP; the NCR must therefore meet the interoperability requirement. BORIS acts as a central search, repository, and disclosure system of all UBO information [Commission Implementing Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in Directive (EU) 2015/849 of the European Parliament and of the Council, Section 1 of Annex].

As in the case of the NCR, to establish and operate the ECP, the Commission has identified a number of key areas that should be consolidated. Within several such areas, we can mention the following:

- Assignment of Company Identification Mark. The NCR provides the ECP with a registration number, based on which a European Unique Identifier (the 'EUID') is assigned to companies, as well as to other legal entities, trustees, or similar legal arrangements, which is assigned in Business Registers Interconnection System (the 'BRIS') [Commission Implementing Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in Directive (EU) 2015/849 of the European Parliament and of the Council, Section 3 of Annex]. The EUID shall at least consists of the elements that are necessary to identify the Member State and the NCR in which the company is registered, as well as the company number in the registry [Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, Art 14 (1)]. Member

States may apply an exemption to the management of trusts or similar legal arrangements by not assigning them national registration numbers. However, this exemption shall apply for a transitional period of five years from the date on which the BORIS system was put into operation [Commission Implementing Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in Directive (EU) 2015/849 of the European Parliament and of the Council, Section 3 of Annex].

- UBO Record It is a set of UBO information found in the NCR. The UBO record must contain, inter alia, information on the profile or structure of the beneficial owner, the UBO person, and the interest held. [Commission Implementing Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in Directive (EU) 2015/849 of the European Parliament and of the Council, Section 7 of Annex]. Concerning UBO information and their interest, the NCR must contain at least the following information: name, month and year of birth, nationality, UBO country of residence, and nature and extent of UBO interest [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (15) (c) and Art 1 (16) (d)]. However, this does not preclude the right of Member States to disclose additional information.
- Search Criteria & Service Availability. The minimum list of data that must be disclosed in the NCR is authoritative for the search criteria in the ECP. However, the search portal may have other search criteria available. The system must be available without interruptions (24 hours a day and 7 days a week) [Commission Implementing Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in Directive (EU) 2015/849 of the European Parliament and of the Council, Sections 11 and 13 of Annex].

With regard to the NCR, the EJP serves as a portal that contains a wealth of information on code lists, controlled dictionaries, and glossaries. In addition, the EJP provides references to Member States' legislation as well as references to NCRs of individual states. The information provided in the EJP is translated into the EU official languages if necessary

[Commission Implementing Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in Directive (EU) 2015/849 of the European Parliament and of the Council, Sections 10 of Annex].

5. Central Registry of Bank Accounts

The 5th AML Directive does not use the term central registry of bank accounts, but in line with the principle of technological neutrality[7], it uses the generic name **'Centralized Automated Mechanisms'** (the 'CAM') [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Recital 22]. Some possible forms of CAM are given as examples, such as central registries or central electronic data retrieval systems. These are technical instruments that facilitate due identification of natural persons and legal entities who own or control payment and bank accounts, as well as safe deposit boxes [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (19)].

To identify individuals and legal entities, bank accounts must be identified by an IBAN. IBAN is defined as: '*an international payment account number identifier, which unambiguously identifies an individual payment account in a Member State, the elements of which are specified by the International Organization for Standardization (ISO)*' [Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 Text with EEA relevance, Art 2 (15)].

The 5th AML Directive also stipulates the minimum set of information that should be collected in a CAM. However, the minimum set of information does not limit the scope of the information disclosed by the Member States, so **additional information** may be added if necessary [Directive (EU) 2018/843 of the European Parliament and of the Council of 30

[7] Technology neutrality is when not a single national technical solution for electronic identification is at a disadvantage within a Member State [Commission Implementing Regulation (EU) 2021/369 of 1 March 2021 establishing the technical specifications and procedures required for the system of interconnection of central registers referred to in Directive (EU) 2015/849 of the European Parliament and of the Council, Art 12 (3) (a)].

May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (19)]. However, the reason or purpose of providing additional information remains questionable. It is clear that the purpose of the 5th AML Directive is to disclose complete information to the competent authorities about the person owning or controlling payment and bank accounts as well as safe deposit boxes. In this context, we see a conflict with Article 4 (2) of Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offenses, and repealing Council Decision 2000/642/JHA (the 'Information Directive'). Additional information registered by the Member States in the CAM in centralized bank account registries[8] shall not be accessible to and searchable by the competent authorities under this Directive.

The conditions for accessing information in the CAM vary depending on whether it is **public (restricted)** or **unrestricted access**. Where the purpose of disclosing the information is to enforce transparency, the CAM be accessible to the public. The FIU as well as other competent authorities shall have unrestricted access to the information for the purpose of carrying out their duties under the 4th and 5th AML Directives. Such disclosure must be made immediately and unfiltered [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Art 1 (19)].

Information on other competent authorities, as well as their list, is not part of the 4th and 5th AML Directives. Access to bank account information by the competent authorities is thus left to the Member States. Under Art 3 of the Information Directive, each Member State must designate the national competent authorities and communicate the list to the Commission.

In this case, we encounter an **application problem** in the inconsistency of the method of determining the competent authorities. A competent authority of one Member State may not be deemed competent in another Member State. As a result, such authority may have unrestricted access to the CAM in its own country, while such access may be denied to it

[8] It should be noted that the Information Directive does not use the term CAM, but centralized bank account registries; for more details see [Directive (EU) 2019/1153 of the European Parliament and of the Council of 20 June 2019 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA, Art 2 (1)].

in another country. One possible solution is to give the competent authorities direct access to the connection platforms of all Member States. Another solution should be to create a single list of competent authorities at the EU level [Report from the Commission to the European Parliament and the Council on the interconnection of national centralized automated mechanisms (central registries or central electronic data retrieval systems) of the Member States on bank accounts COM (2019) 372 final: 1-2].

If the access is provided to all competent authorities according to the first option, it will be necessary to stipulate complex access and search conditions in the CAM. As the list of authorized entities may vary from country to country, we again point out the inconsistency of access to information for the competent authorities. In this case, it may be appropriate to consider the possibility of establishing a common list of competent authorities at the EU level.

In addition to the areas above, the relevant Commission Report further elaborates on the issues of finding and operating CAMs, including the technical specification of the systems [Report from the Commission to the European Parliament and the Council on the interconnection of national centralized automated mechanisms (central registries or central electronic data retrieval systems) of the Member States on bank accounts COM(2019) 372 final: 7-13].

6. Application Issues Associated with the Use of National Central Registries

Although the establishment of the NCR has slightly increased transparency, some issues remain, including the reliability and accessibility of such information. Application problems associated with the NCR can be divided into the following areas:

- NCR Information Access Fees Although this is a legal requirement, further specified in the 4th and 5th AML Directives, it is clear that such a requirement may cause complications with access to information. These will be mainly people who regularly need to obtain such information, for instance, for a larger number of companies. Given that the information is subject to change, it is not likely to be a ‘one-time’ inspection but a regular inspection at certain intervals. At each visit, the applicant will be forced to pay again for verification of the data obtained previously. That is why, in the spirit of the transparency principle, the acquisition of such information should not be subject to any fees.
- Online Registration To identify a person interested in accessing data in the NCR, some countries require, in addition to general information (such as first name, last

name, date of birth, etc.), a citizen identification number, which is only available to the citizen of the country. Here, we also see a similar problem in terms of the complexity of the access to information, especially for citizens of other EU Member States as well as outside the EU, who will probably not have the necessary data.

- NCR Data Retrieval Criteria The list of data retrieval criteria is not further specified in the 4th or 5th AML Directives and was thus left to the discretion of the Member States. It is clear that the Member States have a wide range of criteria that they can require from a person interested in obtaining information when searching for a legal entity. For instance, it is possible for a search to require specific information that is difficult to obtain from the general public (e.g. a tax identification number). It will be a difficult obstacle that a person outside the country may not be able to overcome.
- Accuracy of NCR Information The FATF highlighted concerns about the accuracy of the information in the NCR. According to FATF findings, some information was inaccurate or unverified. In this context, the FATF pointed out several problems: the absence of a specific way of independently verifying the data contained in the NCR, the absence of interconnection of the systems used by different authorities (e.g. tax offices), and the absence of a mechanism for monitoring or updating data [FATF Best Practices on Beneficial Ownership for Legal Persons 2019: 21-23]. The issues above have been partially addressed by the 5th AML Directive, which required the competent authorities and obliged entities to report any discrepancies they find between the information disclosed in the NCR and that available to them. Nevertheless, this is hardly something that can be considered as regular data monitoring. The general public's access to NCRs may also not be a guarantee of quality, thus it is important that the competent national authorities of the Member States put in place their own control systems to ensure accurate and up-to-date information [European Banking Federation: Lifting the Spell of Dirty Money: 34]. Without an automated system for verifying the information contained in the NCR, the registries may resemble a simple mailbox collecting information irrespective of its accuracy [Van der Merwe 2020: 14].
- NCR Reliability At present, it is not possible to rely on NCRs as the only source of information. Based on the FATF Recommendations as well as the 4th AML Directive, obliged entities must not rely solely on NCRs to exercise general due diligence. In this case, the RBA Approach must be applied [FATF International Standards on Combating Money Laundering and the Financing of Terrorism &

Proliferation: 91-95] [Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and the Council, and repealing Directive 2005/60/EC of the European Parliament and the Council and Commission Directive 2006/70/EC, Art 30 (8) and Art 31 (6)]. It is clear that the NCR is not considered a reliable source of information at the international level. The reality thus remains that obliged entities will continue to use other resources to carry out a complete and reliable identification of the customer [Mor 2021: 5].

- Registration of the Entire Ownership Chain in the NCR Currently, Member States require the identification of UBO data that is at the first level of ownership. In this context, it may not be possible to verify UBO at other levels of the ownership chain. However, if the entire chain of ownership is not disclosed, a 'black box' will be created at unidentified levels, preventing the identification and verification of the identification of beneficial ownership at the lowest level [Knobel 2019: 23]. Related to this is another issue regarding the form of proof of beneficial ownership when a transaction is made at the request of a natural person. Beneficial ownership is identified using any types of agreements and contracts executed between natural persons based on which one natural person makes a transaction on behalf of another person. The most difficult is to ascertain the existence of such a relationship if only an oral agreement was made between the individuals. In this case, the name of the actual UBO may not appear in any document. It is therefore important to verify whether a particular person is indeed the beneficial owner and thus has some form of material control or some share of the benefits thereof [Votava, Jeanne, Hauch, Clementucci 2018: 30].

7. Conclusion

At the end of this paper, we have summarized the essential points supporting and confirming our hypothesis. The FATF RN is the basic pillar on which the relevant EU legislation is based. The FATF RN regulates the basic and rather general framework for regulating the concept of beneficial ownership. It examines and deals with the difference between ownership and control on the part of a natural person over a legal entity. If a transaction is made on behalf of another person, the FATF RN emphasizes the need to apply the part of the definition when it is not possible to reliably identify the beneficial

owner solely based on a percentage interest in that legal entity. The identification of the beneficial owner must be carried out using the RBA Approach.

The 4th AML Directive introduced its own concept of UBOs. In contrast to the FATF RN, the 4th AML Directive regulates the conceptual features of UBOs, which are the percentage of shares, voting rights, or ownership interest in business entities. The amount of the percentage, similarly to the FATF RN, is set at 25%, which raises questions about the correctness of that threshold. In our view, even though the Commission may—once the conditions stipulated have been met—submit a report to the European Parliament and the Council for consideration on the appropriateness of reducing the share percentage set initially, this is like to be an inflexible regulation. Under the current legislation, those UBOs who may even intentionally hold a lower share of the legal entity main remain 'behind the scenes' exactly to avoid 'control' by the competent authorities and the general public. We see a similar problem in the context of the surrogate appointment of senior management members as 'scapegoats' to avoid being labelled as UBOs. We understand the reason for introducing legislation as the last resort for identifying UBOs, but at the same time the depth of investigation of the ownership chain, which currently only applies to the first level, remains an open question.

A similar problem persists in the UBO definition in the Money Laundering Act. However, in order to defend this definition, it is necessary to emphasize the appropriate division of entities considered to be UBOs into specific categories. Such a division provides a better overview of UBO identifiers with an emphasis on their application in the relevant national central registries.

Within the applicability area of the NCR, the issue of access to the information disclosed by the NCR is particularly interesting in the legislation. With legal entities and in line with the transparency principle, FIUs and other competent authorities (e. g. NBS, law enforcement authorities, etc) have unrestricted access to UBO data, while the general public has restricted access (insofar as the range of information is disclosed). The situation is different with trusts, where access to information is restricted to a well-defined list of entities from which the general public is excluded.

In the Slovak Republic, NCRs are divided depending on the type of legal entities which are subject under the Money Laundering Act to the duty to register UBO data with the relevant registry. When it comes to the CR, the fact that UBO is not disclosed to the general public is specifically stated, for instance directly at the Commercial Registry website, even in a restricted mode. This raises the question of the compatibility of the

approach above with the transparency principle, which is currently deemed to be essential at the European level.

However, access to information is not limited to nationals of a particular country and is intended to verify the identification of UBOs by other interested parties from the other Member States or third countries. The success of the use of NCRs depends on whether the deadlines set for the implementation of the relevant EU legislation are met, which imposes the obligation to integrate the NCR with the ECP via technical systems. The ECP is to serve as a single or common portal providing a connection to the NCR.

Currently, the hot issue is the creation of a central registry of bank accounts (5th AML Directive uses the term CAM for this registry). While a basic framework for the operation of CAM has been established at the European level, the consensus among the relevant actors at the national level has yet to be reached[9]. The original draft law on the central registry of bank accounts has not yet found support among the experts. For instance, the Slovak Banking Association submitted several fundamental comments on the draft law[10]. The Slovak Republic has thus been in default with the implementation of the 5th AML Directive, which originally required the introduction of CAM in the Member States by 10 September 2020 [Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Article 1 (42) (IIIa)].

Assessing the success of NCRs is currently probably premature. Referring to Transparency International, recent research has shown that EU Member States are failing to fully implement the NCR legislation [Pearson 2021: 1]. The most common issues are connected with the non-disclosure of NCR information to the general public, the setting of fees for access to information, as well as the restriction of access to information for citizens of the other EU Member States and third countries. When it comes to application issues, we consider the introduction of fees for access to information, as well as the (in)topicality and (in)reliability of the NCR data to be the key issues. In the future, it will probably be necessary to set up an effective system for checking and verifying the data kept in the NCR and to stipulate a sanctions list for non-compliance with these duties accordingly. To make use of existing systems, the competent authority managing the NCR should be primarily responsible for the timeliness of the data.

[9] State as at 16-08-2021.
[10] For more details on the comments of the Slovak Banking Association, see [LP/2021/200 Act on the Central Registry of Accounts (current version)].

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