



A Comprehensive Analysis of Material Breaches issued in 2021 and 2022

Part II

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Enforcement Section



Agenda

- Materiality of different BO related breaches
- Statistics on BO breaches
- Overview of the most important requirements at law and salient decisions of the CMC
- Red flags on reporting
- Key take aways



Seriousness of BO Breaches

<p>Failure to Report or consider reporting an STR where the suspicion is due to concealment or disguise of BO</p>	<p>Very High</p>
<p>BO/s: not known</p>	<p>Very High</p>
<p>On-Going Monitoring: Changes in BO/s not detected.</p>	<p>High</p>
<p>Ownership & Control Structure: not obtained/not collected/ not Verified</p>	<p>High</p>
<p>BO Not Appropriately Determined</p>	<p>High</p>
<p>Senior Managing Officials: inappropriately identified senior managing officials as BOs</p>	<p>High</p>
<p>Senior Managing Officials: No explanation as to why Senior Managing Officials listed as BOs</p>	<p>Low</p>



Examples of Enforcement Cases (BO Obligations)

Administrative Penalty
€80 – €100K

Aggravating Factors

- Failure to Report suspicion of BO concealment found in more than 3 files.
- Significant Activity undertaken running in millions, probability of facilitating ML/FT.
- Failure persisted for more than 1 year.
- Impact on local Jurisdiction

Mitigating Factors

- Size of SP is small
- Level of cooperation exhibited
- Not Repetitive
- Not Systemic

Administrative Penalty
€30k – €50K

Aggravating Factors

- Failure to Report suspicion of BO concealment found in less than 2 files
- Failure persisted for more than 1 year
- Size of SP is large

Mitigating Factors

- Minimal activity undertaken, hence low probability of facilitating ML/FT
- Level of cooperation exhibited
- Impact on local Jurisdiction
- Not Repetitive
- Not Systemic

Administrative Penalty
€30k –€50K

Aggravating Factors

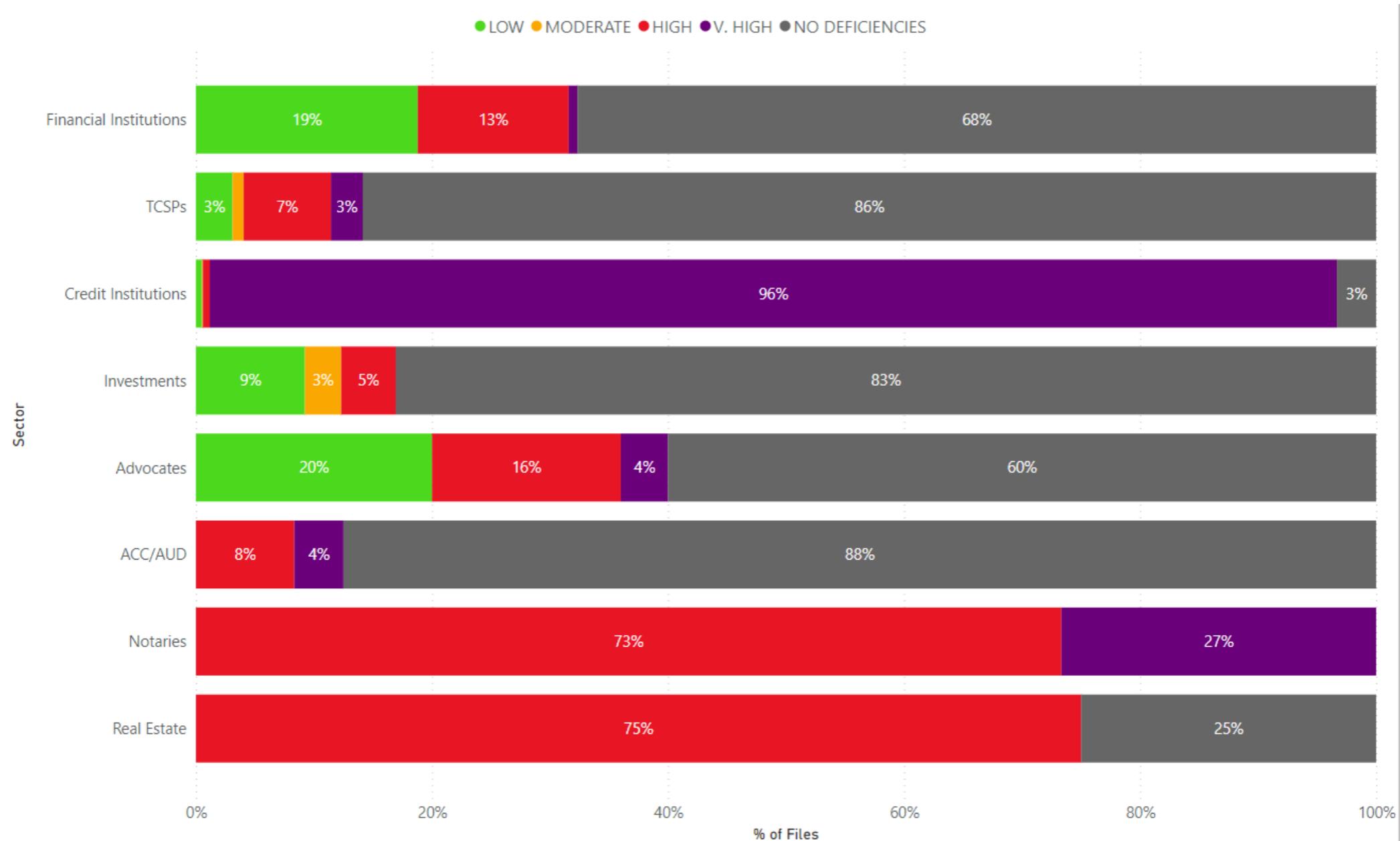
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Statistics on BO Breaches





Identification and Verification of Beneficial Owners

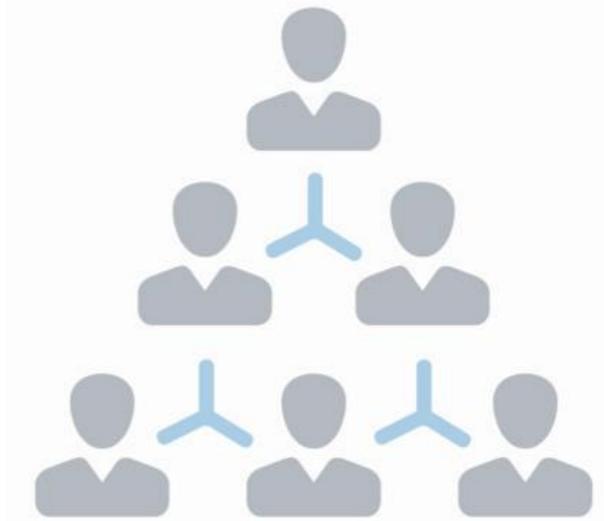
Tier 1	Tier 2	Tier 3
SPs need to identify any natural persons who control the legal person (customer) through ownership by means of holding, directly or indirectly, 25% plus one of the shares, or more than 25% of the voting rights or of the ownership interest in the customer.	Once control through ownership has been considered as set out in Tier 1, subject persons need to identify any natural persons who control the legal person through other means. Control through means other than ownership cannot fall within a single definition and subject persons must decide on a case-by-case basis	If after having exhausted all possible means and provided there are no grounds of suspicion, no BO is identified in accordance with Tier 1 and/or Tier 2, the natural person(s) who hold(s) the position of senior managing official(s) of the customer should be identified as the BO.

For further information on how to identify a BO, reference should be made to Section 4.2.2 of the Implementing Procedures



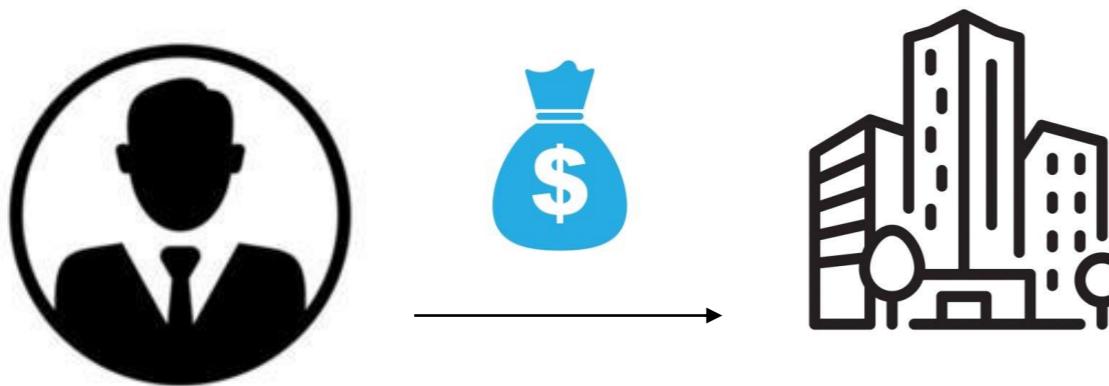
Establishing the ownership and control structure

- Certain structures may be more complex (i.e. more multi-layered and involving various entities and legal arrangements) and this is where the risk of BO concealment and other ML/FT risk may be higher.
- SPs are expected to perform the necessary checks and collect information to be able to understand the ownership and control structure.
- In the case of multi-tier and complex structures: maintaining on file / in electronic form a chart showing the ownership structure to the extent of knowing the BO is ideal.
- Both the explanation and the structure chart should contain sufficient detail to allow the SP to understand how the BO is linked to the customer and to allow eventual verification of this.
- Independent research to verify the information on the corporate structure by consulting online commercial databases, company registries, relevant audited accounts or by obtaining certification.





Information on the Purpose and Intended Nature of the business relationship



Where there is evidence that a legal entity is not self-sufficient i.e.,

- It receives substantial capital injections from its beneficial owners or
- is being regularly funded by its beneficial owners through other means

SP is expected to request the BOs involved to provide SOW information to determine the activities from which their wealth is derived.



Transaction Scrutiny

Breaches identified include the failure to scrutinise transactions involving beneficial owners such as:

- transactions being effected to and from the BO to the customer, or
- transactions effected between companies having the same BOs



Red flags pertaining to Reporting: Information on the customer / BO

- Adverse information on persons connected to the BO (e.g. spouse involved in criminal activities)
- Adverse information on previous shareholders with a share transfer occurring as soon as this information is made public
- Adverse information on companies owned by persons connected with the BO, with such companies being involved in the same line of business as that of the CSP's customer
- BO does not appear to have knowledge/experience on the activities of the customer company unlike the connected persons



Red flags pertaining to Reporting: Information on the customer / BO

- Previous BO was convicted for fraud, tax evasion or other crimes
- Previous BO was under investigation or has known connections with criminals
- BO insists on the use of an intermediary in all interactions without a sufficient justification
- Legal persons / arrangement cannot be found online despite offering a commercial business
- Complex corporate structures that do not appear to legitimately require that level of complexity or which do not make commercial sense



Red flags pertaining to Reporting: Usage of legal instruments

- Usage of a power of attorney empowering the initial BO to carry out all the business of the customer, without consulting the second BO or the new BO or the service provider
- Other legal instruments which can be used to facilitate the concealment of beneficial ownership include:
 - ❖ Foundations
 - ❖ Trusts
 - ❖ Shell companies
 - ❖ Shelf companies
 - ❖ Front companies
- Transfer of shares so that no one person appears to hold 25% or more of the shares and a SMO has to be identified



Red flags pertaining to Reporting: Communication

- The BO does not communicate with the SP, with the behaviour of the individual with whom the SP is communicating being more similar to a BO rather than that of an intermediary
- Contact with BO is limited or BO is reluctant in providing information
- Although there has been a share transfer, the SP is still receiving instructions from the previous BO and the previous BO is aware of the operations of the customer company and continues to retain power and control in the day-to-day management of the same



Red flags pertaining to Reporting: Transactions

- Capital injections made within the company which are then transferred elsewhere within a short period of time without a commercial rationale
- Payments on behalf of the customer made from persons related to the previous BO or from the previous BO himself / herself
- Layering of funds through the use of legal arrangements and financial instruments, multiple jurisdictions to channel funds as well as third parties and intermediaries



Red flags pertaining to Reporting: Transactions

- The transaction involves complicated transaction routings without sufficient explanation or trade records
- It involves the use of multiple large cash payments
- The funds involved in the transaction:
 - are unusual in the context of the client or customer's profile
 - are anomalous in comparison to previous transactions effected by the customer





Key takeaways



- Beneficial ownership is not only decided through one's ownership of the shares and voting rights. There can always be control through other means such as, funding the operations of the customer, involvement in decision making, and continuous correspondence with another individual without justification are all aspects that need to be well factored in
- Information is to be considered holistically
- Documentation is to be analysed properly – it is not sufficient to simply collect documentation for the sake of having it on file



Thank you!