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The UBO register – implementation into the Dutch national law, comparative analysis

Abstract: *Global corporate constructions and complex schemes of money laundering, tax evasion, tax avoidance and terrorism financing have been exercised for many years. In this respect, the more coordinating and efficient steps for combating money laundering and terrorist financing shall be taken. The 4th and the 5th Money Laundering Directives of the European Union oblige its member states to establish central registers for the purposes of reporting the UBOs of the legal entities and other legal arrangements in order to bring more transparency in the corporate schemes. This article examines the possible implementation of the UBO register under the national legislation of the Netherlands and provides a brief comparison with the existing central registries within the EU member states, additionally it describes the forthcoming obligations of the Dutch trust offices and legal entities in relation to the future register and reporting of the UBOs.*

Key words: *ultimate beneficiary owner, the UBO register, Anti-Money Laundering Directive, terrorist financing, risk based approach, customer due diligence, ownership, control.*

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Реестр конечного владельца бенефициара - реализация в рамках голландского национального законодательства, сравнительный анализ

Аннотация: *Глобальные корпоративные конструкции и сложные схемы созданные для отмывания денег, уклонения от уплаты налогов, и финансирования терроризма используются в течение многих лет. В этом отношении должны быть приняты более скоординированные и эффективные меры по борьбе с этими преступлениями. 4-я и 5-я директивы Европейского Союза по отмыванию денег обязывают государства-члены ЕС создавать центральные реестры для регистрации конечных владельцев бенефициаров юридических лиц и других юридических договоренностей для обеспечения прозрачности корпоративных схем. Эта статья рассматривает возможную реализацию реестра конечных владельцев бенефициаров в рамках национального законодательства Нидерландов и предоставляет краткое сравнение с другими центральными реестрами, созданными в других государствах-членах ЕС, а также описывает предстоящие обязательства голландских трастовых офисов и руководств юридических лиц по отношению к реестру и регистрации конечных владельцев бенефициаров.*

Ключевые слова: *конечный владелец бенефициар, реестр конечных бенефициаров, Директива по борьбе с отмыванием денег, финансирование терроризма, подход, фактор риска, надлежащая проверка клиентов, владение, контроль.*

Introduction

Global corporate constructions and complex schemes of money laundering, tax evasion, tax avoidance and terrorism financing have been exercised extremely for many years. Today the Financial Action Task Force (*hereinafter* the FATF) and the European Union (*hereinafter* the EU) present a set of legal and regulatory frameworks on the steps to be followed in order to tackle money laundering and terrorism financing. According to the late fraudulent and corrupted schemes, it became evident for the public

that not only criminals use legal constructions and arrangements to launder immense amounts of illegally obtained funds and other criminal means, but also the rich and powerful – the star football players and politicians, the dictators and democratically elected leaders – who consciously choose to neglect their civic and legal duty to pay taxes by employing creative tricks offered by questionable advisors [1].

That is why it is of great importance to understand the whole purpose of the legal construction concerned as well as its ultimate beneficial owner, or in other words a person who holds the main interest in or stands behind a particular legal scheme. This article will review the definitions on ultimate beneficial owner (*hereinafter* the UBO) as well as why it is necessary to set up the UBO register in the Netherlands and other EU member states, what should be a legal basis for it, which information will contain register in the Netherlands and which enforcement will apply for non-compliance filing data on the ultimate beneficiary in the UBO register. Article reviews the EU and FATF law sources that relate to the UBO and the UBO register as well as refers to Dutch national acts and prospective amendments.

Main body

The EU was trying to take appropriate steps to combat money laundering for the purpose of protecting financial systems of its member states long before the Swiss Leaks, the Wiki Leaks, the Panama Papers, the Paradise Papers and the Offshore Leaks were revealed. Based on recent money laundering cases such as Russian Laundromat, Danske Bank ABLV Bank and UBS Bank it is clear that there is a real threat to the financial market. Besides the EU, the FATF as an inter-governmental body is constantly busy with setting standards, recommendations, guidance on how to effectively implement legal, regulatory and operational measures for combating money laundering, terrorist financing and financing of proliferation.

Undoubtedly, each state has its own mandate to tackle such criminal activities within the state as well as cooperate with other states in order to prevent or take action against crimes that include transnational element. Undoubtedly, due to sovereignty and discretion of each state to decide on its internal matters including criminal and penal codes, national laws are extensively diversified from each other. Therefore, the need for uniform and common standards for combatting money laundering and terrorism financing was the essence in the most jurisdictions.

Legal Frameworks

The globally interconnected financial system makes it possible to hide and move funds around the world, and money launderers and terrorist financiers as well as other criminals have increasingly made use of that possibility [2, Recital 25]. That is why already back in 1991 the European Economic Community Council adopted Directive on the prevention of the use of the financial system for the purpose of money laundering (*hereinafter* the 1st AML Directive) [3] which initially contained 18 articles and set minimum measures for combating money laundering with focus on the credit and financial institutions. Directive gave the discretion for the member states to decide upon appropriate measures and penalties to fight against money laundering. Afterwards, a chain of amending Directives followed, and namely (*hereinafter* the 2nd AML Directive) [4] in 1997 and (*hereinafter* the 3rd AML Directive) [5] in 2005. In 2012 the FATF presented 40 Recommendations on the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation [6] and in 2014 it published FATF Guidance on Transparency and Beneficial Ownership [7]. In meantime in 2015 the EU for the fourth time amended AML Directive (*hereinafter* the 4th AML Directive) [8] which now contained 69 extensive articles. In 2018 the 5th amendment [2] (*hereinafter* the 5th AML Directive) followed, which came into force on July the 9th. These legal

frameworks all together aim to prevent the use of the financial systems for the purposes of money laundering and terrorist financing, which can be achieved by ensuring that corporate and other legal entities incorporated within the territories of the EU member states obtain and hold adequate, accurate and current information on their beneficial ownership. The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise be able to hide their identity behind a corporate structure [2, Recital 25]. That is why the 4th and the 5th AML Directives oblige each member state to implement the provisions of the Directives into their national laws until January 10, 2020, including obligation to establish the UBO register that will keep the data on the UBOs.

Even though the Netherlands has not implemented the 4th and the 5th AML Directives yet, it's national law covers money-laundering and terrorism financing offences under the Dutch (Prevention) Act on Money Laundering and Terrorist Financing (*hereinafter* Wwft 2018) [9], the Dutch (Supervision) Act on Trust Offices (*hereinafter* the Wtt 2018) [10], and Law on economic offences [11]. The obligation to register all legal entities are governed by the Trade Register Act 2007 [12].

Definition of the UBO

It is necessary to point out a number of definitions that are applicable in international, European and national legal sources.

The FATF Recommendation 10 (b(i)) states that the beneficial owner shall be identified and reasonable measures shall be taken in order to verify the identity of such person, through the following information:

“The identity of the natural persons (if any – as ownership interests can be so diversified that there are no natural persons (whether acting alone or together) exercising control of the legal person or arrangement through ownership) who ultimately have a controlling ownership interest in a legal person.”

In the footnote of the recommendation it is outlined that:

“a controlling ownership interest depends on the ownership structure of the company. It may be based on a threshold, e.g. any person owning more than a certain percentage of the company (e.g. 25%).”

Thus, meaning that it is recommended to use threshold of 25%, however it is not compulsory.

The Glossary of the FATF Recommendations sets out the following definition:

“Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.”

“Ultimately owns or controls” and “ultimate effective control” refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control. By customer is also meant beneficial owner of a beneficiary under a life or other investment linked insurance policy [6, page 111].

Article 3 (6) of 4th AML Directive took over the definition that is set in the Glossary, however it further outlines the direct [8, Article 3(6(a(i)))] and indirect [8, Article 3(6(a(i)))] ownership with the threshold of 25% with the specification that each member state has discretion to decide for a lower threshold.

Article 1(1(b)) of the Wwft 2018 defines the UBO as follows (subject to the possible interpretation of the original article in the Dutch language):

“ultimate beneficial owner: the natural person who is the ultimate owner of or has control over a client, or the natural person at whose expense a transaction or activity is carried out”.

The Wtt 2018 does not provide separate a definition, it rather refers to one that is adopted under the Wwft 2018. The Dutch acts do not explicitly prescribe any fixed threshold for credit, banks and other financial institutions, as well as to the natural persons, legal entities or companies that are acting in the context of their professional activities, thus leaving discretion to them to decide upon lower threshold than 25% of ownership or control.

From the Dutch perspective the entities falling under the supervision of the Wwft 2018 and the Wtt 2018 apply mainly 25% threshold, whereas, for example, ABN Amro Bank and ING Bank in the Netherlands under these acts – both apply 10% threshold.

In some situations, it may appear that it is not possible to appoint any UBO. However, for this reason the 4th AML Directive has adopted Article 3(6(a(ii))) that states that in case of absence of the UBO a person holding position of senior managing official shall be appointed and his/her identity shall be verified. Article 3(12) of this directive further clarifies that senior management means an officer or employee with sufficient knowledge of the institution's money laundering and terrorist financing risk exposure and sufficient seniority to take decisions affecting its risk exposure. By senior managing official may be understood senior managing director (statutory board member), Chef Executive Officer, Chairman of the company or a policymaker.

In case of trust the UBO can be the settlor, the trustee(s), the protector (if any), and beneficiary or any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means. The Wwft 2018 determines senior executive staff as a person who determines the day-to day policy of the institution or person who works under the responsibility of an institutions who holds an executive position directly below the echelon of the day-to-day policymakers and who are responsible for natural person whose activities affect an institution's exposure to the risks of money laundering and terrorist financing [10, Section 1(1)].

The only exception for not identifying and verifying the identity of any shareholder or beneficial owner of the company applies to company that is listed on stock exchange and is subject to the disclosure requirements. Stock exchanges are publicly accessible and contain an expensive information on company profile, such information among other include description of the company, its activities, management board/directors, major shareholders, capital and shares in float. In most of cases listed companies are very transparent and have easily accessible websites where such information can be verified repeatedly.

Based on various definitions on the UBO presented, the main idea behind is to be able to appoint a person who ultimately controls or may have sufficient interest in the company with at least of 25% of shares, voting rights or interest ownership. Again we shall not forget that each state has discretion to implement lower threshold than 25%.

The UBO register in the EU and the Netherlands

Confidence in financial markets from investors and the general public depends in large part on the existence of an accurate disclosure regime that provides transparency in the beneficial ownership and control structures of companies [6, Article C(5(b))]. The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise be able to hide their identity behind a corporate structure [18, Recital 25].

The main purpose of establishing the register is combat financial and economic criminal wrongdoings such as money laundering, corruption, tax evasion, fraud, terrorism financing and by such bring more transparency regarding the possible ultimate

holders within the legal entities that are incorporated in the member states of the EU including the Netherlands.

According to the Article 30(3) of the 4th and the 5th AML Directives each member state shall implement the central UBO register, for example, a commercial register, companies register in its national law until January 10, 2020 which will maintain basic information on the UBO and exchange information or the provision of assistance between the EU Financial Intelligence Units (*hereinafter* the FIUs).

The Netherlands is currently in the last stage of implementation of the UBO register into its national law. The expected date of entry into force is January 10, 2020. For comparison, a number of other member states have implemented such registers already. It is worth to mention that the registers, definitions of the UBO, the UBO data that should be collected, registration obligation and possible sanctions differ per state. According to the comparative analysis that is presented in Annex 1 to this article (comparison is prepared based on various open publications of PricewaterhouseCoopers and KPMG) [15]. Based on the comparison, it is clear that Denmark has implemented a publicly accessible register since May 23, 2017, whereas Austria has decided to store UBO information electronically within the government with the Ministry of Finance as the manager of the register, whereas, for instance, the UBO register in Cyprus, Finland, Poland and the Netherlands will be managed by the Trade Register. A number of countries have or will implement a separate register for trusts and similar legal arrangements. The Netherlands is also considering establishing a separate register for trusts, whereas, for instance, in Belgium and Germany data on trusts is registered within the trade register and no separate register will be formed. Some states decided to implement publicly accessible registers, others with limited access for public and some for non public registers with an access to the FIUs and competent governmental authorities. In most countries the obligation to register the UBO lies on the management of the entity, and sanctions for not registering the UBO, incorrect and fraudulent information differ per state.

Based on the Dutch Explanatory Memorandum on Amendment of the Trade Register Act 2007 and the Wwft [13, page 21-22] it is explained that companies and legal persons such as private and public limited companies, foundations, associations, cooperation's, shipping companies, European public limited liability companies, European cooperative companies, European economic interest groupings are obliged to disclose their (in)direct ownership, where is meant that the UBO, a person that is the ultimate owner or has ultimate control over the entity, foundation or association. It relates to the persons with more than 25% of the shares, voting rights or persons who in fact has control over the entity. Stock listed companies, sole traders, churches, some historical legal entities, associations of owners and public bodies do not fall under the obligation to register their UBOs.

Information on the UBO

The Dutch UBO register will become a part of the Dutch Chamber of Commerce (Kamer van Koophandel (*hereinafter* the KvK)) which in turn is a part of the Dutch Trade Register which is governed by the Trade Register Act [12]. The KvK will have a mandate to manage the UBO register and the data collected.

The obligation of registering the UBO and corresponding UBO data within the UBO register falls on the shoulders of the management of the entity concerned. The UBO data shall contain the name and surname, birth month and birth year, nationality, state of residency and the nature and extent of the interest of the UBO in the entity. With regard to the latter, incidentally, when it comes to percentages of shares, voting rights or ownership, the exact size of the interest will not be made publicly available, the interest will be represented by ranges, namely from 25% to 50%, or from 50% up to

75% and from 75% to 100%. This information will become publicly assessable in exchange for an administrative charge. On the other hand, such data as tax identification number, the day of birth, birth country and place, living address, copies of the valid identification documents and copies documents that show the nature and extent of the economic interest in the entity will be accessible only for Financial Intelligence Unit (FIU) and authorized governmental bodies and will not become publicly accessible. The 4th AML and the 5th AML Directives stipulates that data shall remain accessible for a minimum of five years and no more than ten years after the corporate or other legal entity has been struck off from the register (Article 30(10)).

The register will not provide an option to search by name of the UBO. Search engine of the publicly available information will allow to search for an information only by typing in the name of the company. Administrative charge will apply for request of publicly available information.

Privacy issue

On one hand, public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system [2, Recital 30]. On the other hand, the privacy of the UBO shall be preserved and protected. The register shall meet the requirements on data protection flowing from the General Data Protection Regulation [14]. The exit point is that only part of the registered UBO details will be publicly accessible such as name and surname, birth month and birth year, nationality, state of residency and the nature and extent of the interest of the UBO in the entity. Nonetheless, based on the Article 30(9) of the 4th and the 5th AML Directives there is an option for the UBO in the exceptional cases to request to have publicly accessible data protected, in other words block the access to all or part of the information on the beneficial ownership from the public. Such exceptional cases might be when there is disproportionate risk, risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, or where the beneficial owner is a minor or otherwise legally incapable. Still the Dutch designated competent authorities such as the Public Prosecution Service, the police, the tax authority and the Financial Intelligence Unit would always be able to view and access this data. Thus, the UBO would have a possible to file a request to the KvK to block the access to personal data, whereas KvK is entitled to evaluate whether to grant such approval on case-by-case basis. Objections and appeals to such decisions will be possible. It is still unclear how such application would look like, and how or by what means the UBO shall prove the existence of an exceptional case.

Enforcement and sanctions

The KvK is directly linked to the Dutch tax authority, namely as soon as the KvK registers a legal entity; the registered data on the company is automatically forwarded to the Dutch tax authority. The burden to communicate in relation to the obligation of registering the UBOs will lie on the KvK and the Dutch tax authority would not have responsibility to proceed with such communications. Thus, the KvK would also be obliged to report to the Dutch tax authority about the registered information on the UBOs. It is predicted that KvK would need 2.5 years in order to proceed with full registration of all possible UBOs of around 1.5 million entities that are currently registered within the Trade Register. However, these predictions depend on whether accurate, precise, truthful information and in timely manner will be submitted to the KvK as well as the capacity of the KvK. It is still not clear how the KvK will re-verify the information, whether it will have four-eye principle and possibility to double check the truthfulness of the data submitted as enforcement will take place only based on the

information, signals provided by KvK to the Dutch tax authority. Nonetheless it is clear that KvK would in any event need to take a proactive role, including checking of information against other sources (such as shareholder, population or national identity registers), in order to be able to identify anomalies or inconsistencies.

For enforceability there would be two possible sanctions applicable, namely for minor offences will be apply administrative sanctions, whereas for aggravating circumstances like on purpose submitting false UBO-information will apply criminal sanctions. The amounts and possible imprisonment terms are not yet specified.

The UBO register and the Dutch trust service providers

The Dutch trust service providers (*hereinafter* the TSP) are governed by the Wtt 2018. Trust services consist of providing directorship, domiciliation in combination with additional services like advising on legal aspects, providing a legal entity to make use of flow-through company, sale of legal person, acting as a trustee (nominee) of the trust or similar legal arrangements.

Based on the 4th and the 5th AML Directive and the Wwft 2018 Article 3 the TSPs are obliged to carry out customer due diligence, ongoing monitoring, investigation and reporting of unusual and suspicious transactions, identification of the beneficial owner of a legal person or legal arrangement, identification of a politically exposed person, sharing of information by competent authorities and sharing of information by credit institutions and financial institutions and other obliged entities.

In that context, TSPs must identify the UBOs of their clients and take reasonable measures to verify the identity of those UBOs. The UBOs of the legal entities managed by the TSP shall be registered within the KvK by the management of the entity concerned. Pursuant to Article 30(8) of the 4th and the 5th Directives and Article 3 (14) of the Wwft 2018, the Wwft institutions shall not rely exclusively on the central register to fulfil their customer due diligence requirements. Those requirements shall be fulfilled by using a risk-based approach [6, Recommendation 1-Risk-based approach]. They are therefore expected to collect more information in the context of their client investigation than just the UBO information in the trade register. Additionally, as soon as the Wwft institutions enter into a new business relationship with a company or other legal entity or a trust or similar legal arrangement, a proof of registration or an extract must be collected. In case of any discrepancies of the data collected and the one that is reported in the Trade Register, the Wwft institutions is obliged to report to the KvK the content of the information obtained.

Conclusion

According to the late fraudulent and corrupted schemes, it became evident for the public that not only criminals use legal constructions and arrangements to launder immense amounts of illegally obtained funds and other criminal means, but also the rich and powerful consciously choose to neglect their civic and legal duty to pay taxes, launder money and finance terrorist attacks. In order to combat such criminal activities there is a vivid necessity for common action such as implementing the UBO registers in all member states of the EU in order to be able to track the persons behind the corporate and complex schemes. The EU 4th and the 5th AML Directives, the FATF Recommendations and the FATF Guidelines call member states of the EU to take appropriate measures to tackle with these issues. Due to sovereignty of each member state the directives implement minimum measures and leave discretion to the member states to decide upon the greater ones. The same applies for the definition of the beneficial owner where the EU and the FATF set a threshold of 25% of ownership or control of legal entity or legal arrangement in order to fall under the definition of the UBO. Nonetheless the member states may decide to lower the threshold below 25%.

Besides that, it is requested that each member state until January 10, 2020 implements into its national law the central UBO register which will contain a data on the UBO. Each member state may decide whether the register will become public, with restricted access or will not be publicly accessible at all. The Netherlands is at the last stage of implementing the UBO register into its national system. However, it is clear that the UBO register will be partially public and will entail the obligation for the management of the entities to register the UBOs by the Dutch Chamber of Commerce. Privacy aspects of the UBOs shall be preserved and protected. It is still unclear which evidence of exceptional circumstance shall be presented in order to protect the UBO information from becoming public. Additionally, more clarity on the sanctions for non-compliance is required. It is expected that the UBO register in the Netherlands will be established by January 10, 2020 and only afterwards it would be possible to bring clearance on the registration procedures, obligations of the UBO and legal entities, sanctions as well as the effectivity of such register.

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