

Update on the progress of the UBO register in the Netherlands

On January 31, 2018, the Dutch government published the proposed Decree implementing the Money Laundering and Terrorist Financing (Prevention) Act 2018 (*Uitvoeringsbesluit Wwft 2018*) (hereinafter: the draft decree). The draft decree stipulates additional rules for defining the ultimate beneficial owners (UBOs) of legal entities in the Netherlands. The services provided by certain institutions means that they must identify these UBOs. The additional rules on the definition of UBO in the draft decree are also important for the scope of the UBO register. In all probability, these rules will also apply to the UBO definition in the bill that is to implement the UBO register. This bill is expected to be presented to the Lower House in the coming months.

The implications of the UBO register were explained in our earlier reports, but at that time there was not yet a definition of UBO focusing on legal entities. Based on the draft decree, we can however say with some degree of certainty which categories of persons will be regarded as UBO for the purposes of the UBO register. The terms defined in the draft decree will very likely largely be the same as the definition of UBO as it will apply for the UBO register.

4th and 5th EU Anti-Money Laundering Directive

The publication of the draft decree must be seen in the context of another important development that has recently taken place at the European level. In the 4th Anti-Money Laundering Directive the EU Member States had already agreed to implement the UBO register, which contains data on the ultimate beneficial owners of certain legal entities/legal forms. In December 2017 the EU Parliament and the Council of the European Union reached a provisional agreement on the further tightening of the 4th Anti-Money Laundering Directive.

This provisional agreement shows that the 'more than 25% interest' criterion will not be lowered. It was also agreed that the UBOs of companies and trusts that are effectively established in an EU Member State must also be included in the UBO register. Lastly, it was agreed that the European UBO registers must be publicly accessible. The latter is not expected to apply to the UBO registers of trusts. Only people who can demonstrate a legitimate interest will be able to access the UBO information of these trusts.

As soon as these changes are final, they will be included in the 5th EU Anti-Money Laundering Directive.

UBO definition focusing on various legal entities

Capital companies

The draft decree describes which categories of persons will be regarded as UBO of the various entities. The list is not exhaustive. It does however appear that the following persons will, in any case, be regarded as UBO for the purposes of the Money Laundering and Terrorist Financing (Prevention) Act (hereinafter: Wwft): natural persons

who directly or indirectly hold more than 25% of the shares, the voting rights or the ownership of non-listed companies or who through other means are the ultimate beneficial owner of or have control over the company. This makes clear that depository receipt holders with an ownership interest of more than 25% in the company can be regarded as UBO of that company.

It has also been decided that if no-one can be designated as UBO or if there is some doubt about whether a person is the ultimate beneficial owner of or has control over the company, the senior management of the company will be regarded as UBO. The draft decree does not explain the scope of the term 'senior management'. According to the explanatory notes, this option is a fallback option, which the Wwft institution may only use when all other means to establish the identity of a UBO have failed.

Partnerships

For partnerships (general partnership (*vof*), partnership, limited partnership (*CV*)), a natural person qualifies as UBO for Wwft purposes if they are directly or indirectly entitled to a share of *more* than 25% of the profit or the membership rights upon liquidation of the partnership. A natural person will also qualify as UBO if they can exercise more than 25% of the votes in respect of resolutions to change the partnership or in respect of the execution of the partner agreement other than for the partnership's management duties. Here too, the fallback option applies to the senior management of the partnership if it cannot be established who the UBO is.

Foundation

In the case of a foundation (*stichting*), the founders, directors, beneficiaries and each natural person who through other means exercises ultimate control over the foundation is regarded as UBO. Insofar as it is not possible to determine who these separate UBOs of the foundation are, the group of persons in whose interests the foundation was primarily set up or for whom it works, will be regarded as UBO. It is unclear what impact the legislation will have in the case of a trust office (*Stichting Administratiekantoor*). The draft decree does not answer the question whether, for example, the holders of depository receipts with an interest of less than 25% in a company of which the foundation holds shares qualify as UBO. This will ultimately have to be assessed on a case-by-case basis. There are serious doubts about whether holders of depository receipts in a classic situation where a trust (*Stichting Administratiekantoor*) holds shares as asset manager of the depository receipt holders, must be regarded as 'beneficiary' of the foundation. After all, these depository receipt holders do not receive any distributions from the assets/special purpose assets of the foundation, but a distribution on the shares in the underlying company.

Trust

The Netherlands is not acquainted with the formal legal form of 'trust'. It is however conceivable that Anglo-Saxon trusts have their place of effective management in the

Netherlands or are effectively established in the Netherlands. For these trusts, the founders, trustees, the potential protector, the beneficiaries (or persons in a comparable position) qualify as UBO for Wwft purposes. If it cannot be determined who these separate persons of the trust are, the group of persons in whose interests the trust was primarily set up or works for, will be regarded as UBO.

Contact

For institutions as referred to in the Wwft, there is now more clarity about who to identify a UBO. It is also becoming increasingly clear who will be regarded as a UBO for the purposes of the future UBO register. Part of the UBO register is also expected to be made public. If you have any questions about the above or about how the UBO register will impact your situation, please contact Meijburg & Co and Meijburg Legal. We would be pleased to help you ensure that the correct information is included in the UBO register.

Meijburg & Co
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