

Draft 2018 Decree implementing the Wwft provides greater insight into specifics of UBO register

On April 6, 2018, the Draft 2018 Decree implementing the Wwft (hereinafter: the draft Decree), accompanying the Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*; hereinafter: Wwft), was published. The draft Decree includes an elaboration of the concept of UBO (Ultimate Beneficial Owner). Although the draft Decree specifically refers to a further elaboration of the Wwft, it is also relevant for the pending UBO register. Both originate from the 4th EU Anti-Money Laundering Directive. There will not be a separate UBO register; the UBO information will instead be part of the data in the Trade Register. We will however use the well-established term 'UBO register'.

The Explanatory Memorandum accompanying the draft Decree explicitly states that the UBO concept in the draft Decree will also apply for the purposes of defining UBO for the UBO register. The bill to implement the UBO register is expected before the summer. It will also include for which entities UBO information must be registered. This will be the legal entity categories listed below, but could also include other entities (for example, formal foreign companies).

Basic assumptions for establishing the UBO in general

Of importance is the draft Decree's basis assumption that each entity listed in the draft Decree has one or more UBOs. This concerns entities appearing in the Decree. There are five different legal entity categories, which all have their own specific UBO concept and which are addressed separately below.

It is also important that there are basically two types of UBOs: the economically entitled UBO and the controlling UBO. If, once the rules referred to in the draft Decree have been applied, no 'real' UBO emerges, then an individual who is a member of the executive management will be the UBO (the pseudo-UBO).

The draft Decree formulates rules on the basis of which it can be determined who at least counts as a UBO. This does not affect the possibility that individuals who do not meet the 'hard' criteria can still qualify as a UBO due to specific rights or agreements.

Amended UBO definition focuses on the five different categories of entities

The draft Decree indicates for the different legal entity categories who the UBO is of that legal entity. Below we indicate per entity category who in any case qualifies as a UBO.

1. BV and NV

The UBO of a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*; BV) or a public limited company (*naamloze vennootschap*; NV) is in any case the individual who is the direct/indirect owner of the BV or NV or who controls it via:

- directly or indirectly holding more than 25% of the shares, the voting rights or the ownership of the company, including the holding of bearer shares; or
- other means, including the consolidation conditions referred to in Section 2:406 Dutch Civil Code, and, for example, shareholder agreements.
- If there is doubt about which individuals qualify as UBO (fallback option) after all other possible means have been exhausted and provided that there are no grounds to suspect otherwise, no 'real' UBO is identified, or if there is some doubt about the 'real' UBO, then the individual or individuals that are members of the executive management of the company (the director/manager) will be the UBO.

For the purposes of the Wwft, the SE and the European cooperative company are considered to be the same as a BV and an NV, as are other legal entities that are comparable to the NV or the BV. Whether these parties will also have to publish UBO data in the Trade Register depends on the Implementation Act.

The shareholder who holds more than 25% of the shares will usually be the UBO. It is clear that holders of depositary receipts can also fall under the definition of UBO, as well as individuals who, via special shares or special (shareholder) agreements, are entitled to more than 25% of the value of the company or 25% control of the company.

An exception applies to listed companies and wholly-owned subsidiaries of listed companies, because they already have to register their major shareholders. Those companies do not have a UBO within the meaning of the draft Decree.

2. Churches

That churches also have a UBO is new. The UBO of a church is the individual who has been appointed as the legal successor in the church constitution in the event the church is dissolved; or (fallback option) if they cannot be identified: the individual who is listed as director in the own constitution or in the documents of the church organization.

3. Other legal entities including foundations (*stichtingen*)

The UBO of another legal entity is the individual who is the ultimate owner or has control over the legal entity by holding, directly or indirectly, more than 25% of the ownership interest. Or the person who can exercise more than 25% of the votes in the case of resolutions amending the articles of incorporation of the legal entities. Or the person who has effective control. If these people cannot be identified, then the (pseudo-)UBO is the individual who is a member of the executive management of the legal entity.

4. Partnerships

The UBO of a partnership (*maatschap*), general partnership (*vennootschap onder firma*; VOF) or limited partnership (*commanditaire vennootschap*; CV) (or similar entities, such

as a shipping company) is the individual who has the ultimate ownership of or control over more than 25% of the partnership or who can exercise effective control. 'Ownership' is in any case understood as being entitled to profit distributions, distributions from the reserves, or any liquidation surplus. If it is not possible to identify these people, then the (pseudo-)UBO under the fallback option is the individual who is a member of the executive management of the partnership. This could be the partners in a VOF, the general partners in a CV and the partners in a partnership. The limited partner is excluded from the latter category. To avoid any doubt: the 'ownership criterion' means that a limited partner can still be the UBO of a CV.

5. Trusts

Trusts are legal concepts that are predominantly found in Anglo-Saxon countries. A trust will almost never be established in the Netherlands. The UBOs of a trust (the founder, trustee, protector and the beneficiaries) will therefore almost never appear in the Dutch UBO register. They may however appear in foreign UBO registers.

Progress and final remarks

The draft Decree will be debated in Parliament. As stated above, it has also been announced that an amended bill to implement the UBO register will appear before the summer.

As a final remark we would like to point out that the above applies for the purposes of defining the UBO concept in the Dutch situation. However, the obligation to have a UBO register applies to all EU Member States. Many Member States already have an operational UBO register (such as France). If you are, directly or indirectly, the UBO of a foreign legal entity, then you may have to register abroad.

If you have any questions about the above or about how the UBO register will affect your situation, please contact Meijburg & Co and Meijburg Legal. We would be pleased to help you analyze how the UBO concept and the UBO register will affect your personal situation.

Meijburg & Co
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