



July 2020

Dutch Ultimate Beneficial Owner (UBO) Register Implementation

To secure the transparency required to fight money laundering and terrorism financing pursuant to the EU Anti-Money Laundering (AML) Directives, the Netherlands will now implement a public register of Ultimate Beneficial Owners (**UBOs**). On June 23, 2020, the Dutch Senate adopted the implementation act needed to create this UBO register.

The Act may go into effect presumably not later than by September 2020, at which time all newly established entities must submit for public registration in the trade register (maintained by the Dutch Chamber of Commerce) information to identify their UBOs. Existing entities are afforded some leeway and must register their UBOs within 18 months from the effective date of the new legislation. The registration obligation has no retroactive effect. Accordingly, entities already in existence when the act takes effect do not need to register individuals who qualified as UBOs between the implementation of the UBO register and the first registration, but who are no longer a UBO at the date of registration.

Who is subject to the obligation to register UBOs?

The following entities will be required to register UBOs:

- Dutch law incorporated BVs (private limited liability companies) and NVs (public limited liability companies) Vs), except:

- listed companies subject to the disclosure requirements specified in the EU Transparency Directive or equivalent international requirements, and
- (directly and indirectly) wholly owned subsidiaries of such listed companies.
- European companies (SEs) and European cooperative societies (SCEs) having their registered office in the Netherlands;
- the following Dutch law-incorporated legal entities:
 - foundations (*stichtingen*),
 - associations (*verenigingen*),
 - cooperatives (*coöperaties*), and
 - mutual insurance associations (*onderlinge waarborgmaatschappijen*).
- the following Dutch law-governed entities:
 - private partnerships (*maatschappen*),
 - limited partnerships (*commanditaire vennootschappen*),
 - general partnerships (*vennootschappen onder firma*),
 - European economic interest groupings (EEIGs), and
 - ship owning partnerships/associations (*rederijen*).
- Dutch-qualified Public Benefit Organizations (PBO, or *Algemeen Nut Beogende Instelling (ANBI)*). Although a PBO has no UBO, as its sole beneficiary is the public benefit, its board members must nevertheless be included in the UBO register. The register will state that the directors do not “own” the PBO.

Note: Dutch corporate law determines the nationality of a legal entity, and thus the law which will govern its existence and validity, based on the law of the state or country of its incorporation. Consequently, entities incorporated under Dutch law that migrate to another jurisdiction will remain in principle Dutch entities. Conversely, entities incorporated outside of the Netherlands, but which migrate into the Netherlands remain subject to the law of the state or country of their incorporation. Such “formally foreign legal entities” are required to file their accounts in the Netherlands in the same way a Dutch entity would be obliged to, and this obligation rests on the managing directors. For the purposes of the Dutch UBO filing obligation, however, since “formally foreign legal entities” entities are not legal entities incorporated under Dutch law, they will not be obligated to register their UBOs in the Netherlands. The same will apply to branches of foreign entities registered in the Netherlands.

Trusts (with a trustee domiciled in the Netherlands, or representing a trust in a commercial transaction or the acquisition of real estate in the Netherlands) and Dutch mutual funds (*fondsen voor gemene rekening*) will soon also be obliged to register their UBOs on the basis of a separate bill, which was distributed for consultation on April 17, 2020. This draft bill remains subject to (much) debate.

Who is a UBO?

The definition of UBO is provided in the general Dutch Anti-Money Laundering and Terrorism Financing (prevention) Act (*Wwft*, the Dutch **AML act**) and in secondary legislation, i.e., the *Wwft Implementation Decree 2018 (Uitvoeringsbesluit Wwft 2018)*, and provides for the following:

- For private limited liability companies (BVs) and limited liability companies (NVs) as well as comparable other legal entities or European public limited companies and European cooperative companies the UBOs are the individuals (natural persons) who directly or indirectly hold more than 25% of the shares, voting rights or an ownership interest in the company. But a lower percentage is not an absolute safe haven. Individuals who do not hold more than 25% of the shares, voting rights or ownership interest in a company can also be classified as a UBO if such persons have ultimate ownership or control of a company in any another way. Also, if the ultimate ownership of, or control over, a company is held indirectly, for example through another legal person, such as a trust office foundation, or any other structure of legal persons, it is the natural person(s) with the ultimate ownership interest or control who is to be regarded as the UBO. Natural persons who hold bearer shares in a company can also be considered a UBO. If an individual holds a qualifying ownership interest in a corporate entity through depository receipts issued by a Dutch foundation (*stichting administratiekantoor*), the individual will still qualify as a UBO of the company.
- Foundations, together with associations, mutual insurance companies, and cooperatives, are considered “other legal entities”. UBOs are the individuals who directly or indirectly have an ownership interest of more than 25%, who can exercise more than 25% of the voting rights in respect of changes of the articles of association, or who can exercise effective control over the legal entity. The statutory director of the foundation and association will often be the UBO.
- For limited partnerships: because there can be no shareholding in a partnership, natural persons who hold more than 25% of the ownership interest in a partnership, or who, in more specifically defined cases, can exercise more than 25% of the voting rights regarding changes of the limited partnership agreement or are able to exercise actual control in a partnership, are UBOs. Ownership interest also includes a right to distribution of the profit or reserves of the partnership, or to a surplus to be distributed after liquidation.
- With respect to a trust (or trust-like structure), all persons belonging to any of the following categories are considered UBOs, irrespective of the percentage of their interest:
 - the incorporator(s);
 - the trustee(s);
 - the protector(s);
 - the beneficiaries, or where the individuals benefitting from the legal arrangement or entity have yet to or cannot be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates, irrespective of interest of or allocated to such beneficiaries individually; and
 - any other natural persons exercising ultimate control over the trust by means of direct or indirect ownership or by other means.

Natural persons who meet the UBO threshold, through direct or indirect ownership or exercise control over the trust by any other means, also qualify as a UBO.

Scope of registration

Entities must provide the following information about their UBOs to the trade register:

- name;
- month of birth, year of birth, country of residence and nationality;

- nature and extent of the economic interest held by the UBO (voting rights or ownership interests, ranging from: up to 25%; 25% to 50%; 50% to 75%; and 75% to 100%);
- date of birth, place of birth, country of birth and home address;
- Dutch citizen service number (BSN)/foreign tax identification number;
- copies of documents used to verify the abovementioned personal details (e.g., copy of passport); and
- copies of documents showing the nature and extent of the economic interest held (according to the Implementation Decree published for consultation, copies of registers of shareholders, depositary receipt holders or members, articles of association, instruments of incorporation and organizational charts can be used for this purpose).

The information provided under the first three bullet points above will be publicly available (other than in certain circumstances described below). All other UBO information will only be accessible to the Financial Intelligence Unit and specific authorities such as the Dutch Central Bank (DNB), the Dutch Financial Supervisory Authority (AFM), the Dutch Public Prosecution Service and the Dutch National Police. There was debate as to whether to also give entities or persons with a reporting obligation under the Wwft (such as banks, accountants, tax and legal advisers, civil law notaries) access to the additional UBO information. Such entities are the so-called “gatekeepers” of the financial system and, based on the EU AML Directives, they must have access to UBO information in the context of their AML customer due diligence. However, given the large size and diversity of this group, and balancing the privacy interests of UBOs against the purpose of the fourth anti-money laundering directive, it was decided that giving such broader access to the additional UBO information would be disproportionate and unnecessary.

However, if such AML reporting entities find any discrepancies between their actual findings resulting from their mandatory AML UBO investigation and what is registered in the UBO register, under the Wwft they must report such discrepancies to the UBO register. This means that even if a UBO refuses to provide its information to the company that is obliged to register the UBO, the register will be updated because of the discrepancy reporting obligations of AML reporting entities, such as banks, accountants, tax and legal advisers (each of which cannot provide services to the company without having full UBO information). In the case of legal advisers, this reporting obligation overrides legal privilege they would otherwise have had as regards such UBO information, whether or not the controlled company of the UBO is the client. So any unwilling UBO will not only be subject to sanctions for not allowing the company to report properly, but will cause the company under his control to be barred from dealing with banks, or receiving services for civil law notaries or tax and legal advisers.

Privacy and data protection

In certain cases, the otherwise publicly available information referred to above may be shielded from public access, in relation to a UBO who is underage or lacks legal capacity to act or who is placed on a list of persons for whom the government provides protection. UBOs who believe that the disclosure of their information in the UBO register would pose a disproportionate risk can contact the police or the Public Prosecution Service. These authorities will assess on a case-by-case basis whether government protection is necessary due to the existence of a (credible) threat. Whether a person should be placed on this list is judged by the degree of “seriousness” and “probability” of a threat and only if the person cannot independently counter the threat or risk. In this case, UBOs may have a high burden of proof, certainly in respect of threats posed in jurisdictions other than the Netherlands where a threat assessment cannot be easily made. Also, access to information may not be shielded because of the nature and extent of the economic interest held by a UBO.

If the competent criminal authority grants a UBO's request for placement on a list of protected persons, a request to shield access to the UBO information in the trade register can be submitted to the Chamber of Commerce by the UBO or on his behalf by the entity obligated to register. The Chamber of Commerce will not consider the merits of such a request and will only verify whether the person concerned has been placed on the list of protected persons. If the UBO has been placed on the list, the UBO data will be shielded for a period of five years.

The option to apply for shielding the information of a UBO if the latter is placed on the list of protected persons will increase the number of people applying for that protection. But whilst the principle of providing protection to certain UBOs to allow for shielding their information from the public has been set out in the legislation, the criteria to be used when deciding protection applications for this reason are still to be developed. At present it is unclear how the legislature, police, and Public Prosecution Service will deal with this issue, since there is no policy yet how to judge such applications where the perceived threat may have to be assessed taking into consideration circumstances in other jurisdictions which cannot be valued easily by the Dutch authorities. Consequently, until the UBO register procedures have been fully developed, any potentially threatened UBO may wish to consider making a shielding request to the Chamber of Commerce by notifying the competent principal public prosecutor of the need to be put on a list of protected persons. In some specific situations, having made such a request and filing objections or appeals against a negative decision may offer temporary relief.

Members of the general public can only access the publicly accessible UBO information with a valid registration and with payment of a fixed fee. The identity of the persons who access the UBO register will be recorded at the Chamber of Commerce. UBOs will be able to see the number of times their information has been consulted. Checks by the Financial Intelligence Unit and competent authorities are excluded from being so disclosed.

Additional obligations and sanctions

In addition to the submission of information about their UBOs to the trade register, entities must obtain and keep accurate and up-to-date information about their UBOs. UBOs are obliged to provide all necessary information upon the company's request. Failure to comply with these obligations may result in the imposition of administrative sanctions (like an administrative fine of EUR 21,750 and/or a penalty payment) and, in the event of aggravating circumstances such fraud, even criminal sanctions.

Foundations are subject to an additional obligation to keep an internal register of distributions.

Takeaways

- Entities that do not yet have full information about their UBOs should gather the necessary information and keep it up to date. Although existing entities will have 18 months from the entry into force of the new legislation to register their UBOs, newly established entities will have to do so upon their first registration in the trade register.
- Listed companies and their direct and indirect wholly owned subsidiaries are exempt from the obligation to provide UBO information, but companies that are not wholly owned by them (e.g., joint ventures) will be obliged to provide information about their UBOs.
- UBOs concerned about their security/privacy may *inter alia* submit a substantiated request to the Public Prosecution Service or the police to be placed on a list of protected persons. If the request is granted, a request to shield access to the UBO's information in the trade register can be submitted to

the Chamber of Commerce. However, placement on the list of protected persons is unlikely to occur if the perceived threat has not yet materialized to a sufficient extent.

- In relation to UBOs who (i) are minors, (ii) lack legal capacity to act or (iii) have already been placed on a list of protected persons, a request to shield access to their otherwise public information can be submitted to the Chamber of Commerce after the entry into force of the implementation act.
- The entity that provides the required UBO information must ensure that that information is always correctly and properly registered within the trade register. Entities which have a reporting obligation under the Dutch AML act and – under certain circumstances – competent authorities, are required to report to the Chamber of Commerce any discrepancies they find between the UBO information in the commercial register and the information on beneficial owners that they have discovered themselves. Accordingly, entities may not solely rely on the UBO information in the register when investigating a client within the meaning of the AML act. In the context of their customer due diligence, entities may therefore come across UBO information that appears to diverge from the UBO information in the trade register. The duty of confidentiality of lawyers and civil-law notaries does not apply when complying with the obligation to report any discrepancies. A similar waiver of legal privilege exists in the AML act for mandatory reporting of unusual transactions. This separate reporting obligation is referred to in Section 16 of the AML act and requires a reporting entity, including a bar member or civil-law notary, to promptly report to the Financial Intelligence Unit an unusual transaction made or planned, after the unusual nature of the transaction becomes known. Therefore, if an entity has collected information about a UBO which leads to the conclusion that there is an unusual transaction, the reporting entity must report this immediately after the unusual nature of the transaction has become known to it to the Financial Intelligence Unit, in parallel to any obligation to report discrepancies between their findings and the UBO register to the Chamber of Commerce.

** This GT Alert is limited to non-U.S. matters and law.*

Author

This GT Alert was prepared by:

- **Hans Urlus** | +31 20 301 7324 | urlush@gtlaw.com

** Special thanks to Sera Hendrix for her assistance with this Alert.*

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.~ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Salt Lake City. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.‡ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ‡Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are*

also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2020 Greenberg Traurig, LLP. All rights reserved.