

Family Owned Business & Private Wealth

New EU legislation for the identification and registration of UBOs

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On 30 May 2024, new European legislation with the aim to prevent money laundering and terrorist financing was adopted (the *EU AML legislation*).

Currently, companies, legal entities, trusts or similar legal arrangements in all EU Member States are already obliged to identify their ultimate beneficial owners (UBOs) and register them in the UBO-register or Trust register.

The new EU AML legislation changes the rules for the identification and registration of UBOs. This will also lead to changes in the Netherlands. The new rules will come into effect in 2027.

In this news article we will inform you about the main changes. As the new rules will come into effect in 2027, the impact of the new EU AML legislation will be clarified in the next few years.

Legal framework

The EU AML legislation includes a sixth EU Anti-Money Laundering Directive (**6th Directive**) and an EU Anti-Money Laundering Regulation (**Regulation**). The 6th Directive replaces the current (amended) fourth EU Anti-Money Laundering Directive.

A relevant aspect of an EU Directive is that each member state must implement the rules as set out in the Directive into national legislation. Each Member State has thus at this time implemented the (amended) fourth EU Anti-Money Laundering Directive in its own way. In view of that, differences arise in the implementation and application of the Anti-money laundering legislation between Member States. In order to harmonize the Anti-Money Laundering legislation, part of the rules for the identification and registration of UBOs is now included in a Regulation. An EU Regulation has direct effect; meaning that it does not need to be implemented into national legislation, thus ensuring that the same rules apply in all Member States. The 6th Directive and Regulation are expected to apply as of 9 July 2027.

The 6th Directive includes the obligation for Member States to maintain a UBO-register. It also outlines who has access to the UBO-register and when UBO-information can be shielded. Dutch legislation governing these matters will need to be adjusted to comply with the 6th Directive.

The new Regulation includes the obligation for 'legal entities' and 'legal arrangements' to identify and register their UBOs. Legal entities are all corporate and other legal entities that are already required to identify and register their UBOs. Legal arrangements include trusts and similar legal arrangements. The Regulation also contains the UBO-definition.

Changes

The 6th Directive and Regulation introduce several changes to the current UBO-legislation. The main changes for legal entities are the following.

Broadening of the UBO-definition

The Regulation sets out the criteria on the basis of which the UBOs of a legal entity must be determined (the 'UBO-definition'). In that respect, the Regulation provides that ownership and control are the main criteria to identify a UBO. The criterion of 'ownership' only applies in the identification of UBOs of corporate entities. The criterion 'control' applies to all legal entities.

The criterion 'ownership' refers to share interests, voting rights and ownership interests. This is currently also the case. However, the threshold for the qualification as UBO will change. The current threshold of 'more than 25%' will be lowered to '25% or more'. For example, an individual who holds 25% of the shares in a BV (Dutch limited liability company) is currently not considered as UBO of the BV. Following the amendments, that individual will be an UBO of the BV.

Additionally, the Regulation offers the possibility for the European Commission to set a lower threshold of (in principle) 15% or lower for certain categories of corporate entities that are considered to have a higher risk to money laundering or terrorist financing (for instance, due to the sector in which they operate).

Currently, there is one criterion to qualify as UBO by way of control: control through other means; also called effective control. The Regulation now explicitly states that family ties can also lead to effective control over a legal entity.

The Regulation further provides an additional UBO-definition for multiple layered structures in which ownership and control coexist. This additional UBO-definition essentially states that UBOs of a corporate entity are (also),

- a. if a legal entity directly holds 25% or more of an ownership interest in the relevant corporate entity: the individuals who control that legal entity; and
- b. if another corporate entity controls the corporate entity: the individuals holding 25% or more of the ownership in that other corporate entity.

The scope of this expansion is not yet entirely clear, but it appears that the group of individuals qualifying as UBO of a corporate entity will be significantly broadened.

Change of UBO-definition in case of a foundation

In the Netherlands, the UBO-definition for foundations is similar to the UBO-definition for legal entities and is thus based on ownership interest, voting rights in case of statutory changes, and effective control.

The Regulation includes a separate UBO-definition for legal arrangements similar to trusts. The foundation is explicitly mentioned as a similar legal arrangement. This separate UBO definition identifies as UBOs of legal arrangements similar to trusts: individuals that are the founder(s), director(s), member(s) of the supervisory board, beneficiaries of the entity, or individuals who have control over it. If a legal entity is holding any of these positions, the UBOs of the legal entity are (also) the UBOs of the legal arrangements similar to trusts.

Whether the UBOs of Dutch foundations will need to be identified according to this UBO-definition will in principle be determined by the Dutch legislator. The Dutch legislator must report to the European Commission which Dutch legal entities will be subject to this UBO-definition. Based on the considerations in the Regulation, it is expected that foundations will fall under the scope of this new UBO-definition. This new UBO definition will then also apply to foundations acting as 'administration office' (STAKs). The UBO-definition of Dutch foundations is thus expected to be broadened.

If the Dutch legislator decides to apply this UBO-definition to the Dutch foundation, this will not only have implications for identifying UBOs of the foundation itself, but also for corporate entities in which a foundation directly or indirectly holds an ownership interest of 25% or more. The Regulation stipulates that if the legal arrangement similar to a trust directly or indirectly holds an ownership interest of 25% or more of a corporate entity, the UBOs of the legal arrangement similar to a trust are (also) considered UBOs of the corporate entity. This change will therefore also (further) broaden the group of individuals who can be qualified as UBO of corporate entities.

A new regime for senior managing officials as UBO

If no UBO is identified based on the criteria ownership or control, the current (amended) fourth Directive states that the 'senior executives' of the corporate entity qualify as UBO. In the Netherlands, the concept of 'senior managing official' is defined as: 'all individuals who are (directly or indirectly) statutory directors of a legal entity or managing partners in a partnership.'

With the new Regulation, this will change. If no UBO is identified based on the criteria ownership or control, there simply is no UBO. In such cases, a legal entity will be required to submit a substantiated declaration to the UBO-register stating that no UBO has been or could be identified. The information of the 'senior managing official' must still be registered in the UBO-register. The 'senior managing officials' of a legal entity include both the statutory directors as well as the management team (individuals in executive roles that are responsible for the daily management of the legal entity and report to the statutory board).

Change in registration of UBO-information

Currently, following the Commercial Register Act 2007, a copy of the UBOs identification document and documents proving their status as UBO, alongside the mandatory registration of personal data of the UBO are required to be submitted to the UBO-register.

The Regulation does not amend the personal data that must be registered of a UBO. However, depositing a copy of the identification document is not mandatory any longer. The Regulation states that only the registration number of an identity document of the UBO needs to be registered. Furthermore, under the Regulation, a description of the ownership and control structure of the legal entity (structure chart) must be deposited, instead of documents proving someone is a UBO. This description is not required if the ownership and control structure consists of only one legal entity. The description must meet specific requirements. For example, all intermediate legal entities must be shown, including the country where they exist, and their registration numbers (in that country). The Chamber of Commerce who is now responsible for maintaining the UBO-register is obligated to verify all data to be registered and deposited and is granted extensive powers for this purpose in the Regulation. In practice, it may therefore still be required to provide a copy of the identification document and supporting documents for the description.

Stringent rules for the exemption of listed companies

Publicly listed companies that are subject to the disclosure requirements of Directive (EU) 2004/109 or comparable international standards are currently not required to obtain, hold and register UBO-information. In the Netherlands, the exemption also applies to companies of which 100% of the shares are directly or indirectly held by such a listed company.

With the Regulation, the requirements for the exemption for listed companies are significantly tightened. According to the Regulation, the exemption will only apply to companies listed on a European regulated market, subject to the condition that only individuals have direct (and not indirect) control over the listed company. It is suspected that only in a few cases this condition will be met. For 100% (direct or indirect) subsidiaries, the exemption no longer seems to apply.

Introduction of registration requirement for non-EU legal entities

The Regulation introduces a registration requirement for legal entities established or incorporated in a non-EU country, also referred to as foreign legal entities. This registration requirement applies if the foreign legal entity in an EU Member State:

- a. acquires real estate;
- b. acquires certain luxury goods such as cars, boats, or private aircrafts and the purchase price exceeds a certain threshold;
- c. enters into a business relationship with an obliged entity and in which case there is presumed to be a medium or high risk of money laundering and terrorism financing in relation to (i) the sector where the obliged entity operates or (ii) the country the foreign legal entity is located (to be determined based on a risk assessment to be conducted by the Member States and the European Union); or
- d. receives a tender-based contract.

The UBO-information to be registered by the foreign legal entity is the same as for EU legal entities. Foreign legal entities only need to register their UBOs in one EU Member State.

Access to the UBO-register

Since the verdict of the European Court of Justice of 22 November 2022, access to the Dutch UBO-register is closed to the public. Competent authorities have re-gained access to the UBO-register, and obliged entities such as financial institutions, civil-law notaries, lawyers and tax advisors are one-by-one being reconnected to the UBO-register. The fourth Anti-Money Laundering Directive stated that 'persons with a legitimate interest' must also have access to certain UBO-information, namely: the name, month and year of birth, state of residency and nationality, as well as the nature and extent of the interest held by the UBO. For access to the UBO-register by persons with a legitimate interest, the Dutch legislator is working on a new legislative proposal for the restricting of access to UBO-registers. It has been announced that the definition of 'legitimate interest' will be aligned with the 6th Directive, with the exception that individuals wishing to enter into a business relation with a legal entity will need to request the UBO-information directly from the legal entity itself, rather than via the UBO-register.

The 6th Directive designates certain groups of people who are considered to have a legitimate interest. These include journalists and organizations involved in the prevention and combatting of money laundering and terrorism financing, as well as competent authorities from third countries. A person requesting access to the UBO-register must demonstrate their legitimate interest. Persons with a demonstrated legitimate interest will be granted access to the aforementioned data, and according to the 6th Directive, also the historical UBO data, as well as the description of the ownership and control structure of the legal entity (see above under "Change in registration of UBO-information").

Based on the (amended) fourth EU Anti-Money Laundering Directive, Member States may provide for public access to UBO-information to be shielded, on a case-by-case basis, if access to the UBO-information exposes the UBO to a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation. The 6th Directive contains the same provision. When implementing the (amended) fourth EU Anti-Money Laundering Directive, the Netherlands choose to only provide the possibility of shielding of UBO-information in cases the UBO is a minor, legally incapable or under the protection of the Public Prosecutor or the National Coordinator for Counterterrorism and Security. As the shielding provision is included in the 6th Directive which provides the minimum standards that must be implemented in national legislation, the Netherlands is free to continue the current shielding regime.

Contact

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