



Guidance on Wtt18 and Wwft for Trust Offices

Version 1.1, 1 November 2019



HOLLAND QUAESTOR

“Guidance on Wtt18 and Wwft for Trust Offices”

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1 PURPOSE OF THIS DOCUMENT

On 25 July 2018, the Money Laundering and Terrorist Financing (Prevention) Act (“Wwft”) was radically amended, and the Wwft Implementation Decree and the Wwft Implementation Regulation were redetermined. Subsequently, the Trust Offices (Supervision) Act 2018, including lower regulations [Trust Offices (Supervision) Decree 2018 and Trust Offices (Supervision) Regulation 2018], entered into force on 1 January 2019. Together, these amendments in fact comprise an entirely new statutory framework for trust offices. New standards have been introduced, while the system of standards gradually introduced in 2004 has been further tightened. The client due diligence review for trust offices has been further enhanced, whereby important terms (such as ‘Ultimate Beneficial Owner’) were rigorously changed.

New regulations normally raise a great deal of interpretation issues. That is logical. The legislator cannot always foresee what practical dilemmas will ensue from particular choices in wording. This is why Holland Quaestor, the association of trust offices, decided to address a number of the most pressing interpretation issues for its members and for other trust offices in order to offer practical guidance for analysts, compliance officers and directors. To this end, HQ set up a task force. This task force surveyed the members on what topics they would like to see discussed and worked out these topics in consultation. We recommend that the HQ members address the various interpretation issues as much as possible in their own procedures manual in order to provide clarity both to its own organisation and to other stakeholders, including the compliance auditor and the regulator. The elaborations below will provide a guide.

1.1 GUIDEBOOK

It has appeared in practice that especially the following elements of the client due diligence review give rise to practical questions: the client concept, the UBO concept, origin of assets, relevant parts of the structure, information exchange, the integrity risk analysis, the acceptance memorandum and the transitional law in respect of the client files. The retention periods under the GDPR and the Dutch State Taxes Act (DSTA) versus the Trust Offices (Supervision) Act give rise to questions as well. Finally, the specifics of the internal compliance function are a point of discussion.

This document will explain for each element what the laws and underlying regulations comprise and what problems trust offices encounter in practice in interpreting these laws and regulations. Subsequently, HQ’s interpretation with regard to these issues will be discussed.

List of definitions and abbreviations:

- Trust Offices (Supervision) Act 2018 (*Wet toezicht trustkantoren 2018*): Wtt18
- Trust Offices (Supervision) Decree 2018 (*Besluit toezicht trustkantoren 2018*): Btt18
- Trust Offices (Supervision) Regulation 2018 (*Regeling toezicht trustkantoren 2018*): Rtt18
- Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en het financieren van terrorisme*): Wwft
- Wwft Implementation Decree (*Uitvoeringsbesluit Wwft*): UBWwft
- Ultimate Beneficial Owner: UBO
- Financial Action Task Force: FATF
- Fourth (and/or Fifth) Anti-Money Laundering Directive: AMLD4 / AMLD5



1.2 LIVING DOCUMENT

The recommendations and interpretations in this document are based on the situation as at 11 September 2019. In the coming period, various other bills will be enacted that will amend the relevant statutory framework to a greater or lesser extent. In addition, communications from the regulator, such as the Wwft and Sanctions Act Guideline, the Good Practices on Fiscal Integrity Risks, the Social Propriety policy rule, newsletters and the announced Relevance of Wtt2018 guide, may influence the current consensus. It is the intention that this Guidance will be revised regularly and that altered viewpoints, as a result of additional insights arising in practice or as a result of amended regulations and the regulator's interpretations, will be incorporated into this document.

2 DEFINITION OF 'CLIENT' AND 'BUSINESS RELATIONSHIP'

2.1 LAWS AND REGULATIONS

Section 1(1) Wtt18 provides the following definitions of 'client', 'object company' and 'business relationship':

- **Client:** natural person, legal person or company with which a business relationship is entered into or for which a trust service is performed;
- **Object company:** legal person or company to which the trust services referred to under (a) and (b) of the definition of 'trust service' are provided;
- **Business relationship:** business, professional or commercial relationship between a trust office and a natural person, legal person or company which is connected with trust services provided by the trust office and which is assumed to be of a long-term nature at the time when contact is established.

2.2 PRACTICE

These definitions are very important and can be given broad and sometimes also different interpretations. Depending on the qualification given to a specific relationship, the statutory obligations may be more or indeed less extensive. The obligation to perform further client due diligence exists only in respect of a client, because this after all is the natural or legal person to whom or which the trust service is provided. Because of the broad definition of the term 'business relationship', furthermore, a business contact may have to be regarded as a client in certain situations, also in situations in which this client or business contact has no independent control and/or cannot exert decisive influence. For example, a disproportionate difference may arise between the business contact's actual role and the scope/depth of the client due diligence review to be performed, without this review contributing to what the Wtt18 tries to achieve.

2.3 HQ'S INTERPRETATION

Who qualifies as a client?

What natural or legal person must be regarded as a client will always greatly depend on the circumstances of the case. The Wtt18 provides for a situation in which the client and the object company are one and the same, and alternatively for a scenario in which the client and the object company are distinct entities or groups (Section 27(4) Wtt18). First and foremost, there is always only one client, which is in principle the party to which the services are provided. Usually this is the same party to which the invoice is sent. Large corporate structures in which entities are managed at central level are less clear-cut. It is not always easy to identify a specific legal person as the client within such a structure.

Below are a number of guides:

- A. Where trust services are performed as defined under 'trust services' in Section 1(1)(a) Wtt18 ('being a director'), the trust office regards as the client:
 - The company of which the trust office becomes the director (the object company);
 - The natural or legal person with whom or which the service level agreement / engagement letter is concluded.
- B. In case of a trust service as defined under 'trust service' in Section 1(1)(b) Wtt18 ('domicile plus'), the client is:
 - The company to which the trust office makes a postal address or physical address available (the object company);
 - The natural or legal person with whom or which the service level agreement / engagement letter is concluded.

- C. In case of a trust service as defined under ‘trust service’ in Section 1(1)(c) to (e) inclusive Wtt18, the client is the legal person with which the service level agreement / engagement letter is concluded.

No client, no mandatory client due diligence

All other natural persons, legal persons or companies with whom or which the trust office is involved in the performance of its services, but who or which are not provided with a trust service, are regarded as ‘business contacts’ but not as clients. The Wtt18 does not prescribe a client due diligence review in cases in which the business contact is not also the client and the relationship is not directly connected to the trust services provided. Examples include professional service providers that are engaged for the benefit of the object company, such as lawyers, auditors, accountants, tax advisers and civil-law notaries.

Feeders

Feeders are business contacts with which the trust office collaborates on a structural and (semi) exclusive basis with regard to joint clients, whether for a fee or otherwise, and whereby the feeder has some form of control or authority to issue instructions in respect of the client. They should be distinguished from service providers that regularly or occasionally introduce prospects or refer prospects to trust offices, such as tax consultancy firms, lawyers or civil-law notaries. If a feeder is involved, this will have consequences for the statutory scope of the term ‘client’. As a rule, feeders will have to be regarded as clients because of the structural collaboration for the purpose of providing trust services. Whether a feeder is involved can be inferred inter alia from the answers to the following questions:

- 1) What does the collaboration entail?
- 2) Does this concern short-term collaboration, regular collaboration or institutional collaboration?
- 3) Is the party that introduces a potential client paid a fee?
- 4) Does the business contact have any form of control or authority to issue instructions?
- 5) What is the feeder’s role in addition to providing the introduction?

Summary

A business relationship exists if an agreement is concluded for the purpose of providing trust services. The party with which the business relationship is created is the client. The client and the object company may be one and the same entity but may also be separate entities.

3 UBO IN GENERAL

3.1 LAWS AND REGULATIONS

A trust office must conduct an investigation into the UBO of the client and/or the object company. For the interpretation of the term 'UBO', the Wtt18 refers to the definition in the Wwft¹: "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".

In view of the nature of the provision of trust services, we will disregard the UBO in the event of incidental transactions (of parties other than clients). These are rare to non-existent in the trust sector.

The investigation into the UBO consists of three steps:

- 1) Identifying all natural persons who qualify as UBOs with the greatest possible degree of certainty;
- 2) Establishing the identity of those natural persons and verifying that identity;
- 3) Verifying the nature and size of the ultimate stake held by the UBO identified.

3.1.1 UBO INDICATORS

When the trust office enters into a business relationship, there are two primary UBO indicators:

- having the ultimate ownership (formal control);
- having the ultimate control (de facto control).

The two UBO indicators no longer require a minimum percentage, as used to be the case in the past. The trust office must itself determine whether and why it regards a natural person as a UBO. Obviously, this consideration or choice must be properly substantiated and documented.

However, the UBWwft lists a number of 'standard' UBOs for some types of client, depending on their legal form. Natural persons who meet these requirements must **in any event** be regarded as UBOs. In case of a (composite) ownership interest of more than 25%, the natural person concerned is a UBO by definition. This percentage is indicative. On top of this, the trust office must determine whether and why other natural persons should also be regarded as UBOs. A natural person with an ownership interest of less than 25% may nevertheless qualify as a UBO.

3.1.1.1 OWNERSHIP

Ownership may take the form of directly or indirectly holding shares or voting rights, being entitled to a distribution of the profits or the reserves, or to a liquidation surplus. In most cases, ownership can be inferred from the documents, such as a shareholders' register. Trust offices must be alert to legal arrangements that separate beneficial and legal ownership. It may happen that a relevant ownership interest is distributed among various relatives or family members and none of these relatives owns a stake of 25% or more independently. In such a situation, the trust office is advised to look at the family or extended family as a whole and to base the eventual identification of the UBO on practical circumstances (which of the relatives is passive and which is active, for example in terms of

¹ Section 1(1) Wtt18 in conjunction with Section 1(1) Wwft

board memberships or ownership percentages). If this practical approach does not offer a solution, the trust office may also decide to regard all relatives or family members as UBOs.

3.1.1.2 CONTROL

Control is less easy to establish than ownership. After all, this involves not only formal control (documented control) but also control in practice. Control through other means may be established inter alia on the basis of the criteria described in the Annual Accounts Directive. Among other things, this involves situations in which a natural person has the right, as the shareholder, to appoint or dismiss the majority of a company's board members, irrespective of the percentage of shares held. Another example is that of natural persons who can exercise predominant control over the company on the basis of an agreement with the company, as may be the case in the event of beneficial ownership. In general, the control will appear from contractual provisions (for instance in relation to a loan or pledge), agreements or organisation charts. De facto control cannot always be established in advance. It may also become apparent after the business relationship has started. The de facto control may also be held by a particular person or body within an organisation. This person need not have an interest in the provision of services himself but, because of his professional capacity, may still be the party that has the greatest influence within the structure of which the object company is part. Examples include a minister in respect of a state fund and a fund manager in respect of an AIF.

3.1.2 IDENTIFYING ALL ULTIMATE BENEFICIAL OWNERS WITH THE GREATEST POSSIBLE DEGREE OF CERTAINTY (CAPACITY OF UBO)

Identification of the UBO lies at the heart of each client due diligence review. In general, HQ recommends that its members first carry out an ownership review. The ownership review is consistent with the statutory duty to identify a UBO and to familiarise oneself with the structure. During the ownership review, the trust office must peel away legal persons, companies and other legal arrangements until a natural person emerges and it becomes clear that this natural person does not act on the instructions of others. Regardless of whether a UBO is found on the grounds of ownership, a trust office also has the obligation to check whether, in addition to a qualification on the grounds of ownership, a qualification should also be made on the grounds of control. As already discussed above, qualification as a UBO on the grounds of control is less evident than qualification on the grounds of ownership. What the trust office can do, however, is to formulate indicators. Please note that control always requires some degree of individual assessment and that a guideline or guidance can never provide a comprehensive answer in this respect.

If neither an ownership review nor a control review can justify the conclusion that there are one or more UBOs of the specific object company, the fall-back option comes into play, which dictates that the senior executive personnel must be regarded as the UBO.

In determining who qualifies as the UBO, it is important that the trust office, together with the legal or tax adviser and the client, identifies the same UBO or pseudo-UBO for Wtt18 purposes and for Wwft purposes. In the case of particular constructions, such as foundations set up in the context of bank securitisations, there may still be a difference between the Wwft and the Wtt18. This will be addressed in chapters 6 and 7 of this document.

3.1.3 ESTABLISHING THE IDENTITY OF THOSE PERSONS AND VERIFYING THAT IDENTITY

Establishing a person's identity is making that person prove their identity. Verifying the identity means establishing that the identity provided corresponds to a person's real identity. Under Section 11 Wwft, this is done on the basis of documents, data or information from reliable and independent sources. Pursuant to case law, the identity cannot be verified with data obtained from the Dutch Tax and Customs Administration, Chamber of Commerce or salary records².

Likewise, possession of only a copy of the identity document is insufficient proof that the identity was verified on the basis of documents, data or information from reliable and independent sources³.

3.1.4 VERIFYING THE NATURE AND SIZE OF THE ULTIMATE STAKE HELD BY THE UBO

By examining the nature and size of the ultimate stake, the trust office can check among other things whether the person specified actually qualifies as a UBO. The nature and size can be examined using articles of association, shareholders' registers, annual reports, etc.

3.1.5 PSEUDO-UBO

3.1.5.1 LAWS AND REGULATIONS

The statutory duty to investigate entails that a natural person must be identified as the UBO at all times (except for a stock exchange listing) on the grounds of ownership and/or control. If these cannot be established, one or more senior executive personnel members must be identified as the UBO (or pseudo-UBO). The latter is expressly a fall-back option, which only applies if all possible resources have been exhausted. Please note in this context that it must be documented what measures were taken in order to establish that there is effectively no conventional UBO, and what difficulties were experienced during the verification process⁴.

The Wtt18 dictates that significant efforts must be made in determining whether there are persons who qualify as the UBO. Accordingly, preference must be given in all cases to identifying a UBO on the grounds of control in the absence of a qualifying ownership percentage. If it is not possible to identify such a UBO, the law requires that the senior executive personnel is identified as the UBO. This is known as a pseudo-UBO. Where the pseudo-UBO is concerned, 'senior executive personnel' exclusively means one or more directors within the meaning of Section 9 of Book 2 of the Dutch Civil Code or, in the case of a partnership, one or more partners, with the exception of a sleeping partner as referred to in Section 19(1) of the Dutch Commercial Code.

3.1.5.2 PRACTICE



Pseudo-UBO up or down?

Since 25 July 2018, trust offices have struggled with the question who exactly should be regarded as a pseudo-UBO. Briefly put, two 'movements' can be distinguished. A technical application of laws and regulations, with due observance in particular of the passages concerning the UBO register, seems to proceed from the fact that the pseudo-UBO must be identified at the level of the object company. If, during the review of the object company,

² ECLI:NL:RBROT:2016:4630

³ ECLI:NL:CBB:2019:225

⁴ See Consultation of the Implementation Act amendments to the Fourth Anti-Money Laundering Directive (AMLD5) and the proposed Section 3(2)(b) Wwft



no UBOs can be identified in the top of the structure on the grounds of ownership or control, the trust company must 'as it were' go back down the structure to the level of the object company. At this level, the statutory directors will then be regarded as UBOs, and these persons will also have to be listed as such in the UBO register. The Financial Supervision Office prescribes this approach in its specific guidelines for the various professional groups under its supervision. This interpretation seems to be most frequently applied outside the Netherlands as well.

However, there are examples of trust offices which chose a different approach and which, on the contrary, opted not to go back down the structure but identify a UBO at the level of the ultimate parent company ("UPC"). The obvious thing would then be to identify the statutory directors as pseudo-UBOs at the level of the UPC. An example would be the CEO of a multinational. This approach is supported by the Dutch Central Bank ("DNB") which, in its consultation version of the new Wwft and Sanctions Act Guideline, states that *'it is fair to assume that the pseudo-UBOs are found at the highest level within the client's ownership and control structure'*.

The pseudo-UBO: looking up or not?

On page 26 of the consultation document (Wwft and Sanctions Act Guideline), DNB observes that: “It is fair to assume that the pseudo-UBOs are found at the highest level within the client’s ownership and control structure. Section 3(6) of the Wwft Implementation Decree 2018 indicates what is meant by ‘senior executive personnel’ in this context.” However, the Financial Supervision Office states on page 9 of its ‘Specific guideline on compliance with Wwft for accountants, tax advisers, trust offices and all other institutions referred to in Section 1a(4)(a) and (b) Wwft (24 October 2018)’ that: “If it turns out to be impossible to trace a natural person who is the ultimate owner of or has the ultimate control over a legal entity by holding shares, voting rights, an ownership interest or other means, the senior executive personnel of the legal entity must be regarded as the UBO.” This is further elaborated in an example on page 10.

With regard to the fall-back option and the ‘pseudo-UBO’, both the Financial Supervision Office and DNB suggest a different approach. DNB proposes to look up, whereas the BFT proposes to look for the pseudo-UBO at the level of the legal entity that is the object company.

It seems, however, that legislation supports the BFT’s view. Thus, we read in the explanatory notes to the Implementation Decree Wwft 2018 that: “It entails that in all cases (at least) a natural person must be regarded as the UBO of a company or legal entity. If it turns out to be impossible to trace a natural person who is the ultimate owner of or has the ultimate control over a legal entity by holding shares, voting rights, an ownership interest or other means, the senior executive personnel of the legal entity must be regarded as the UBO.”

The Registration of Ultimate Beneficial Owners of Companies and other Legal Entities Implementation Decree adds: “It is up to the party obliged to register to determine what documents must be filed for the specific UBO being registered. This documentation must show the nature and size of that UBO. The only exception to this rule is the situation in which the senior executive personnel is registered as the UBO. This situation will only apply if no other UBO can be found in a different manner. As a rule, the members of the board will be registered as the senior executive personnel. In that case, no documentation needs to be filed.” No information needs to be filed because the Chamber of Commerce is already in possession of this data. After all, these persons are already registered as statutory directors.

It backfires that Section 3 of the Implementation Decree Wwft 2018 uses the terms ‘over’ and ‘of’ with regard to the legal person, company or entity. This indisputably creates the impression that a ‘conventional’ UBO is situated at the top, while a ‘pseudo’ UBO must be identified at the level of the object company.

Various trust offices are also active in countries in which the UBO register is already operational, for example in Luxembourg. To our knowledge, the entire financial sector here also works under the assumption that the ‘pseudo-UBO’ must be identified at the level of the object company.

Now that DNB, in the consultation document, proposes a different approach which deviates from the viewpoints of its fellow regulators in the Netherlands and abroad, this further complicates this already difficult issue. Much can be said for this approach: if no ‘conventional’ UBO can be identified on the grounds of ownership or control, it makes sense to assume that the top of the structure exerts influence down the chain. A top entity’s director under the articles of association will still have influence towards the object company, either jointly or alone, even if this is not enough to qualify as a conventional UBO.

Origin of assets

Identifying a pseudo-UBO for a Wwft client is no problem in principle. A client's senior executive personnel will usually already be in the picture, for example as a representative. In the context of the Wtt18, however, it also means that the financial position and the legitimate source of the assets must be determined, because the law does not make a distinction between a UBO based on ownership or control and a pseudo-UBO. HQ has the impression that this is not what the legislator intended. In principle, the financial position of a pseudo-UBO and the integrity risks attached to the business relationship are entirely separate from each other.

3.1.5.3 HQ'S INTERPRETATION (ORIGIN OF PSEUDO-UBO'S ASSETS)

Accordingly, HQ takes the position that the review in respect of the assets does not apply to pseudo-UBOs and assumes that the legislator will remedy this point. HQ raised this matter in various consultation responses.

3.1.5.4 HQ'S INTERPRETATION (PSEUDO-UBO UP OR DOWN?)

As long as legislation is not entirely clear on this point and regulators inside and outside the Netherlands disagree and prescribe different approaches in their respective guidelines, all that HQ can do is to advise trust offices to choose one of the two approaches, record the reasons for this choice and apply the chosen approach consistently. Even though DNB's approach provides greater insight into potential integrity risks and is more compatible with decision-making in practice, the approach advocated by the BFT and most foreign regulators seems to be sounder from a legislative perspective. Trust offices following the approach prescribed by DNB must, however, bear in mind that this approach may not be truly sustainable in the long term. Perhaps DNB may be able to create clarity here in its final version of the guideline or, in the best-case scenario, convince the other regulators or the legislator.

3.1.6 UBO REGISTER

3.1.6.1 LAWS AND REGULATIONS

The legislation through which the UBO register must be implemented in Dutch law is scheduled to enter into force on 10 January 2020. The UBO register is administered by the Chamber of Commerce. Each company is obliged to register its UBO or UBOs there. For trust offices acting as directors of object companies, this means that it is they who have to fulfil this obligation. Pursuant to the laws and lower regulations currently in force, it is necessary to register beneficial stakes of more than 25%. When registering, the trust office needs to submit documents showing this beneficial stake. If a pseudo-UBO is involved, there is no need for now to submit documents. In that case, it will be sufficient to register the senior executive personnel as the UBO (usually all the directors under the articles of association). Under the Consultation of the Implementation Act to the Fourth Anti-Money Laundering Directive (AMLD5), a new Subsection (2) is added to Section 4 of the Wwft and Section 27(2)(f) Wtt18 is amended, to the effect that trust offices, when performing the client due diligence review, must have proof that the client's UBO is listed in the UBO register.

3.1.6.2 PRACTICE:

A trust office decides during the client due diligence review whether UBOs are involved, and to what extent. An object company will often have a 'conventional' UBO on the grounds of ownership or control. If no 'conventional' UBO can be identified and the fall-

back option comes into play, and the trust office has opted for the technical application of the pseudo-UBO, the object company's statutory directors, being its senior executive personnel, will as a rule have to be registered in the UBO register. Directors of the object companies may be trust offices or staff members of trust offices. After all, it is here that the trust office provides the service 'being a director'.

A situation may occur in which a trust office must register its own staff members in the UBO register as being the statutory directors of a company obliged to register. In this context, it may also happen that these staff members are the only registered directors of the object company concerned.



This situation has already been addressed in the Dutch Lower House. During the parliamentary discussion of the Wtt18, Socialist Party MP Renske Leijten tabled a motion, which was carried, in which she urged the Minister to ensure that trust offices do not name their own staff as the 'sole' UBOs as regards the registration in the UBO register. In response, the Minister stated that this situation would not occur because, briefly put, in that case the trust office had failed to identify the UBOs and, based on this fact, was not allowed to provide services. Proceeding from this presumption, the Minister failed to take statutory measures, assuming that this would not be necessary.

That is more nuanced. In most cases, a trust office accepts the instruction from a company that is part of a structure. The trust office regards this instructing company as the client (see chapter 2). However, the company to be managed by the trust office under the agreement need not be the same company as the one that must be regarded as the client. It may happen that the client and the object company are distinct legal persons. A client and an object company will have the same UBOs if they are both part of the same corporate structure. If this structure has no UBOs on the grounds of ownership or control, however, the fall-back option comes into play. With regard to the client this is simple: these are the client's statutory directors. This becomes trickier where the object company is concerned. In principle, the trust office will regard the client's statutory directors as the object company's UBOs as well. However, this choice will not be sufficient where the registration in the register is concerned. Current regulations concerning the register prescribe that the statutory directors of the company obliged to register must be registered as pseudo-UBOs. This creates a discrepancy between what we will call – for the sake of convenience – the AML UBO and the register UBO.

It will most certainly happen that a trust office performed a complete and adequate client due diligence review but can nevertheless only register its own staff in the UBO register in respect of those object companies for which it acts as the sole director.

3.1.6.3 HQ'S INTERPRETATION

On the one hand, there is Ms Leijten's motion and the Minister's response, in which he indicates that directors working for the trust office will never appear on the register as sole UBOs. On the other hand, there is the practical situation in which this wish of the Minister has not been incorporated into the statutory framework. If a technical interpretation is applied, the statutory directors of the party obliged to register will be entered in the register in the absence of UBOs on the grounds of ownership or control. A trust office finding itself in this situation will establish, when performing its own review, that the client and the object company are not the same entity. The provisions on the UBO register prescribe as mandatory that the statutory directors should be registered. It is possible that



these are only the directors of the trust office. This does not mean, as the Minister suggests, that the trust office thereby failed to fulfil its obligation to investigate.

In the situation described above, the approach whereby a pseudo-UBO must be identified by looking down is taken as the point of departure (see the dilemma described under 3.1.5). Much can be said for looking up the structure in identifying pseudo-UBOs. This would also have more added value for the application of the UBO register. Registering directors supplied by trust offices does not contribute to the transparency of a structure for which the UBO register was set up. After all, under no circumstances does this reflect 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”*⁵. In addition, the term ‘Ultimate Beneficial Owner’ implies that this concerns ultimate control. The UBWwft states that a shareholder who has the right as a natural person to appoint or dismiss the majority of the board must be identified as the UBO. This person would then qualify on the basis of control. It is fair to assume that this also applies to an entity that has the same authority. Because an entity cannot be a UBO, the trust office will have to look for the natural person in that entity who holds the ultimate stake in or control over that entity. The continuation of this line of reasoning eventually leads to the UPC. The major shareholder of this party, or the natural persons qualifying as de facto directors (CEO, perhaps also CFO, CCO and General Counsel) would then within reason have to be entered in the UBO register as UBOs. However, current laws and regulations do not allow this, at least for now.

⁵ UBO definition as laid down in the Wwft

4 UBO IN RESPECT OF LISTED ULTIMATE PARENT ENTITIES

The rule under Section 3(1) UBWwft is that, if the client or object company is listed on the stock exchange or is a 100% subsidiary of a company that is subject to the disclosure requirements of the EU Transparency Directive,⁶ or to comparable disclosure requirements in a State outside the European Union, no UBO needs to be identified in principle because these listed companies are already subject to disclosure requirements. With regard to these companies, there is no need either to identify a pseudo-UBO. Effectively, this means an exemption from the UBO obligation. The exemption is subject to conditions: for example, the company must be an issuer. An issuer is a legal person, company or institution which has issued financial instruments tradeable on a regulated market in an EU Member State or in a non-Member State which has a transparency mechanism comparable to that of the EU and similar disclosure requirements. Financial instruments have been defined in Section 1:1 of the Financial Supervision Act and include, among other things: securities, money market instruments, units in an investment institution not being securities, options, futures, swaps, forward rate agreements or other derivatives contracts.

Please note: not all European stock exchanges are subject to the disclosure requirements under the EU Transparency Directive. It is therefore important to check that listed companies have to report significant shareholders.



The object companies served by a trust company may be part of a listed structure. However, it rarely happens that this object company is positioned directly under the listed entity. It is usually a sub-subsidiary, or it is positioned at the bottom of the structure. Often these companies will be owned indirectly for 100%, or in any case for a large part, by the listed entity.

HQ applauds the interpretation that no UBO and no pseudo-UBO needs to be identified for listed companies (= issuers) subject to the Transparency Directive or to comparable international standards in the event that more than 75% of the securities (not being 75% of the financial instruments) of the issuer pertains to the 'free float' (= tradeable on a regulated market in an EU Member State or in a non-Member State which has a transparency mechanism comparable to that of the EU and similar disclosure requirements).

In addition, HQ takes the view that the exemption formulated for the 100% subsidiary of the listed entity also applies to 100% sub-subsidiaries and sub-sub-subsidiaries, in short to all 100% tiers of the structure from the listed entity to the object company. Here, too, it would have to appear from the company's annual report that entities are indeed held for 100% by the listed company.

If it is not clear whether a regulated market meets standards comparable to the EU Transparency Directive, HQ believes that a UBO must be identified for companies listed on such stock exchanges. HQ recommends that its members themselves compile a list of stock exchanges comparable to a European (Union) stock exchange. This will require a one-off effort to determine which stock exchanges meet this criterion. Thereafter, the list can be revised at regular intervals. It is important to substantiate for each stock exchange why the trust office believes that it is sufficiently comparable to an EU stock exchange. Examples of arguments that might be advanced

⁶ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJEU 2004, L 390)



include the extent to which the country follows the FATF recommendations, positioning on lists and indices regarding corruption and transparency, and the extent to which information on the ownership of a listed entity must be disclosed. The latter in particular is relevant in order to determine that there are no persons who hold more than 25% of the shares.

In short:

- 1) The UPC is listed for 75% or more: the exception applies;
- 2) The UPC is listed for less than 75%: the exception does not apply. A normal investigation into the UBO on the grounds of ownership/control will be required, and where applicable a pseudo-UBO will have to be identified;
- 3) The client/object company pertains for 100% to the group of a UPC that is listed for more than 75%: the exception applies;
- 4) The client/object company is a joint venture but held for 75% or more by a listed UPC: the exception applies;
- 5) The client/object company is a joint venture but held for less than 75% by a listed UPC: the exception does not apply. A normal investigation into the UBO on the grounds of ownership/control will be required, and where applicable a pseudo-UBO will have to be identified.

5 UBO IN RESPECT OF UNLISTED ULTIMATE PARENT ENTITIES

Pursuant to Section 1 Wtt18 and Section 3(1) UBWwft and the associated explanatory notes, various categories of natural persons must in any case be regarded as UBOs, depending on the type of legal person or other legal entities.

This involves the following legal persons and other legal entities:

- Private limited company (BV), public limited company (NV) (unlisted, including 100% subsidiary), European public limited company and European cooperative society, as well as other legal entities comparable to a BV or NV;
- Church and religious communities as referred to in Section 2 of Book 2 of the Dutch Civil Code;
- Other legal persons (societies, foundations and suchlike);
- Partnership, shipping company, European economic interest grouping or other legal entities comparable to a partnership;
- Trust and other legal constructs comparable to a trust.



For each legal form, different requirements apply in respect of the persons that must in any case be regarded as UBOs.

Subsection (1)(a) of Section 3 UBWwft relates to private limited companies and public limited companies. Pursuant to Subsection (2), this section also applies to European public limited companies and European cooperative societies, as well as to other legal entities comparable to a BV or NV. The UBOs of a BV, NV or comparable legal entity may first of all be natural persons holding shares, voting rights or an ownership interest in a company. In this context, an indicative percentage of 25% is applied: persons holding more than 25% of the shares, voting rights or ownership interest must in any case be regarded as UBOs. At the same time this does not mean that natural persons holding a lower percentage of shares, voting rights or ownership interest in a company cannot be regarded as UBOs under any circumstances. If these persons have the ultimate control over a company in other ways, for example on the basis of contractual relationships, they will (also) qualify as UBOs on the basis of the criteria laid down in Section 1 Wwft.

Not only natural persons who directly hold more than 25% of the shares, voting rights or ownership interest in a company must be regarded as UBOs. If the ultimate ownership of or the ultimate control over a company is held *indirectly*, for example through the agency of another legal person such as a trust office foundation, or a structure of legal persons, a natural person must be regarded as a UBO as well. In case of indirect ownership, it is important to look at the top entity. Depending on the top entity's legal form, other persons may have to be identified as UBOs pursuant to the UBWwft. For example, these may be natural persons who, based on the definition of UBO for other legal persons in Subsection (1)(c) UBWwft, qualify as the UBO of a trust office foundation that holds the shares in a company. In the event that the top entity is a trust, the settlor, the trustee, the protector (if any) and the beneficiaries will have to be identified as UBOs pursuant to Section 3(1)(e) UBWwft.

In conformity with the provisions of the AMLD4, furthermore, it is made clear that natural persons holding bearer shares in a company may be regarded as UBOs as well. Also, in cases in which a limited right has been established on shares in a company, for example through a pledge on shares or the grant of usufruct in respect of a voting right, the pledgee or usufructuary may be regarded as the UBO of a company.

Pursuant to Subsection (1)(a)(2°) UBWwft, natural persons who are the ultimate owner of or have ultimate control over a legal entity through other means than shares, voting rights or ownership



interest must be regarded as UBOs as well. Under the AMLD4, control through other means may be established inter alia on the basis of the criteria described in Article 22(1) to (5) inclusive of the Annual Accounts Directive. In the Netherlands, these criteria have been laid down in Section 406, in conjunction with Sections 24a, 24b and 24d of Book 2 of the Dutch Civil Code. Among other things, this involves situations in which a natural person has the right, as the shareholder, to appoint or dismiss the majority of a company's board members, irrespective of the percentage of shares held. Another example is that of natural persons who can exercise predominant control over the company on the basis of an agreement with the company, as may be the case in the event of beneficial ownership.

6 UBO IN RESPECT OF HEDGE FUNDS AND PRIVATE EQUITY FUNDS

Trust offices are often involved in the provision of services to hedge funds and private equity funds, whereby they provide trust services to the legal persons or companies forming part of these funds.

- *Hedge funds* may be regarded as investment funds that want to cover themselves as much as possible against unexpected fluctuations in the financial markets.
- *Private equity funds* is a collective name for investors that make venture capital available to unlisted entities.

A hedge fund or private equity fund often has no investor with a 25% stake. An AML letter signed by the hedge fund or private equity fund serves as proof to exclude a UBO in the structure. An AML letter is deemed sufficient, because it turns out to be difficult in practice to prove the underlying structure from the hedge fund or private equity fund to the investors. What is important, however, is that such an AML letter is issued by an institution or person that is subject to the AML/CFT legislation in a country which adequately follows the FATF recommendations.

If there are investors with a stake of more than 25% in the hedge fund or private equity fund, these investors must be regarded as UBOs of the object company. In this context, it is relevant to look at the fund's legal form. Depending on the fund's legal form, other categories of natural persons may be regarded as UBOs pursuant to Section 3 UBWwft. If a fund has a fund manager, the fund manager must, in principle⁷, be regarded as the UBO. After all, the capital of an investment fund (hedge fund or private equity fund) is managed by a fund manager, which means that the fund manager has control over the fund. Fund managers also have control over the sale and purchase of shares.

It is usually professional parties that act as fund manager in the context of their profession or business. Therefore, it will often be the case that the fund manager is not a natural person, but a legal person or company. If the fund manager is not a natural person, the question arises who must be identified as the UBO with regard to the fund manager. Based on the role performed by the fund manager within a fund structure, it seems to make sense to regard as UBOs the de facto directors (statutory directors) of the legal person acting as fund manager. On the other hand, the fund manager's degree of control is limited by the contents of the Limited Partnership Agreement, Offering Memorandum or Prospectus, which raises the question whether it makes sense to regard the de facto directors of the fund manager as UBOs. In addition, it may happen in practice that the fund manager's duties have been transferred on paper to another party. In such a situation, the conventional investigation into both formal and de facto control will have to be carried out in order to identify the UBOs of the legal person or company acting as fund manager.

HQ recommends that its members make an informed choice in this respect and document and work out their considerations in the procedures manual or comparable document.

If no investor or fund manager can be identified as UBO, the natural person or persons pertaining to the senior executive personnel must be regarded as the ultimate beneficial owner (pseudo-UBO).

⁷ In the case of, for example, a PE fund with multiple investments in different countries, the conclusion may be that the party exercising control cannot be properly identified. In such a situation, the fall-back option will come into play again.

7 UBO IN RESPECT OF STATE-OWNED ENTITIES OR STATE-OWNED FUNDS

Trust offices also serve public and semi-public authorities, in particular funds or sovereign wealth funds. In principle, laws and regulations make no distinction between commercial enterprises and state funds or state shareholdings. Under the Wwft and the UBWwft, a UBO will also have to be established in case of a state fund or state-owned enterprise. Because the ownership will, as a rule, always be held by a public body, the obvious thing would be to establish the UBO on the basis of 'control'. The next question is which officers have relevant control within the context of the business relationship with the trust office. It can be inferred from Annex II to the AMLD4 / AMLD5, for that matter, that there is usually no UBO in the case of municipal authorities and other public services.

UBO in respect of a state fund or state shareholding

In the event that the government exerts influence over / invests in a state fund or state shareholding, the (indirect) exercise of voting rights or the exercise of de facto control over the state fund or the state shareholding takes place under the political responsibility of the minister who has this state fund or state shareholding in his/her portfolio. According to HQ, this implies that this particular minister may qualify as the UBO.

If the minister involved is so far removed from the state fund or state shareholding that he/she cannot be said to exercise voting rights or de facto control over the state fund or state shareholding, HQ believes that the person who pertains to the senior executive personnel of the state fund or state shareholding qualifies as the UBO. This will in any case concern the CEO or CFO of the state fund or state shareholding.

With regard to sovereign wealth funds in particular, consideration must be given to the influence that can be exerted by a head of state or minister. Certainly in the case of a sovereign wealth fund from a high-risk country, a thorough investigation must be performed as to whether the minister involved or the head of state should be qualified as the UBO.



HQ points out that the investigation into the de facto control is no easy task, especially where foreign state funds are concerned. Furthermore, HQ finds that the decision who should be regarded as the UBO is not clear-cut in certain situations. Therefore, the consideration why either a minister or a person pertaining to the senior executive personnel of the state fund should be regarded as the UBO on the basis of de facto control must be substantiated on a case-by-case basis and be properly documented by the trust office in the service file.

Example: Holland Casino

Holland Casino is wholly owned by the Dutch State. The Financing and Participation Department of the Ministry of Finance gives substance to the managerial role of shareholder. Various officials can exert influence, ranging from the portfolio holder to the Secretary General, but it is the Minister who, as the person ultimately responsible and the highest in rank, can determine the course. In this context, the obvious thing would be to regard the Minister of Finance as the UBO on the grounds of de facto control.

Example: Volksbank

The shares in Volksbank (formerly SNS) are held by the Trust Office Foundation for the Management of Financial Institutions (*STAK beheer financiële instellingen*, also known as NLF1). After some investigation, it will appear that NLF1 was set up by the Ministry of Finance with the aim to perform the managerial role in a politically independent manner and transfer the stake in Volksbank back to the private sector in due course. Identifying the Minister is now much less



obvious, because this is a situation of deliberate independence. In this case, it seems better to follow the UBWwft provisions on the UBOs of foundations and regard the Managing Director of NLFI as the UBO on the grounds of de facto control, since he is ultimately responsible in principle (subject to a particular mandate) for the course and the day-to-day management of the Volksbank shares by NLFI.

Example: BNG Bank

Bank Nederlandse Gemeenten N.V. is a specialist bank of and for public authorities and social interest institutions. BNG's clients include local and regional authorities, housing associations and utility, care and educational institutions. BNG is a two-tier board company. One half of the shares is owned by the State, while the other half has been issued to municipal and provincial authorities. In this case, the government, and more specifically the Ministry of Finance, owns a stake well in excess of 25%. This makes this situation significantly more complicated than the first two examples. It might be argued that the Dutch State ultimately manages 100% of the shares and that in this case the political responsibility is divided between the Minister of Finance and the Minister of the Interior and Kingdom Relations. Both ministers might therefore be regarded as UBOs of BNG on the grounds of de facto control. From a practical perspective, this approach seems rather formalistic and arbitrary. Furthermore, BNG is well removed and there does not seem to be any structural or official involvement. In this case, and in comparable cases, it does not seem likely that a minister exercises de facto control within the context of the business relationship. The fall-back option will apply. In concrete terms, this means that the members of the Management Board qualify as UBOs or pseudo-UBOs.

8 UBO IN RESPECT OF FOUNDATIONS (SUCH AS SECURITISATION/ORPHAN STRUCTURES)

Securitisation/orphan structures

Securitisation is a well-known and frequently used technique developed for financing assets that are not negotiable due to their very nature. The sponsor's assets are refinanced on the capital market by what is known as a Special Purpose Vehicle ("SPV"), which is used only for the transaction in question. The SPV finances the purchase price of these assets by issuing securities, of which the assets bought are the collateral. What matters is that the SPV is independent and 'bankruptcy remote':

- Independence from the structure is important, for only then will the securitisation fulfil its purpose. If the structure cannot be regarded as independent, there is a risk that the transaction will be dragged into the bankruptcy of one of the parties.
- Bankruptcy remoteness is achieved through what is known as an 'orphan structure'. The SPV's shareholder is an entity that does not have shareholders or members itself, such as a Dutch foundation.

A foundation which is part of a securitisation structure or other orphan structure therefore has the object to serve 'assets held in mortmain' and therefore does not, in principle, have an underlying beneficiary. However, legislation requires that a UBO is established.

In a letter dated 5 March 2018 (Session Year 2017-2018 [Parliamentary Paper 34808 no. 15](#)), the Minister of Finance stated the following in the event that a trust office is the sole director of an object company: "A trust office may only provide services if the trust office has identified the UBOs of both the client and the object company and verified the identity of the UBOs. Prior to the provision of services, therefore, the trust office can never regard itself as senior executive personnel of an object company. After the trust office has started the provision of services, the trust office may qualify as the senior executive personnel of the object company. However, this can never have the effect that the UBOs of the trust office are registered as the sole UBOs of the object company. If the trust office were unable to identify any UBOs of the object company other than itself during the ongoing client due diligence review, there will be grounds for suspecting money laundering or terrorist financing. After all, at that moment it is no longer clear who is the ultimate beneficiary of the services provided by the trust office and who is hiding behind the object company. Because this would make it impossible to identify the UBOs of the object company, the trust office must terminate the provision of services. If the trust office acts as an object company's director together with others, the UBOs of the trust office might indeed be registered as UBOs of the object company."

Taking the foregoing into account, the following interpretation might be followed with regard to UBOs and orphan structures:

- If the trust office acts as the founder and sole director of the foundation, the UBO of the foundation will be the party issuing the instruction to the trust office on the client's behalf (the party signing the engagement letter with the trust office on the client's behalf).
- If the board of the foundation comprises several directors, including a trust office, the fellow director or directors of the foundation, not being the trust office, will qualify as higher executive personnel of the foundation and thereby as the UBO.

The above interpretation entails the following practical challenges:

- In practice, the trust office often acts as the sole director of the foundation in an orphan structure. This means that there are no fellow directors of the foundation that can be identified as the senior executive personnel of the foundation and thereby as the UBO.

- One of the principal characteristics of an orphan structure is the independence of the structure, because only then will the securitisation fulfil its purpose. If the party issuing the instruction to the trust office on the client's behalf is entered in the UBO register as the UBO, this may affect the independence of the structure.

In view of the above problem (see also 3.1.5), there is no unequivocal answer at present to the UBO issue with regard to foundations in an orphan structure. HQ recommends that its members make an informed choice in this respect, based on the information currently available, and document and work out their considerations in the procedures manual or comparable document, while closely following any developments relating to this subject. It is the intention that this Guidance will be revised regularly and that altered viewpoints, as a result of additional insights arising in practice or as a result of amended regulations and the regulator's interpretations, will be incorporated in this document.

It must be documented what measures were taken in order to establish that there is effectively no conventional UBO, and what difficulties were experienced during the verification process.

Trust office foundation

In exchange for holding shares in the capital of a capital company, a trust office foundation (*Stichting Administratiekantoor* ("STAK")) issues depositary receipts to depositary receipt holders. Where a STAK is concerned, there may be a UBO for both the legal ownership and the beneficial ownership. In HQ's view, the following parties qualify as UBOs in the case of a STAK:

- i. the depositary receipt holder that holds more than 25% of all the depositary receipts issued by the STAK;
- ii. the STAK's fellow director or directors;
- iii. if no person qualifies as the UBO under (i) and (ii) – for example because the trust office is the sole director of the STAK – the party issuing the instruction to the trust office on the client's behalf (the party signing the engagement letter with the trust office on the client's behalf).

Other foundations

The UBWwft provides for a separate definition for foundations ('other legal persons') because these legal persons cannot hold shares. The UBOs will be, among others, the natural persons who directly or indirectly hold more than 25% of the ownership interest in the legal person, can exercise 25% of the voting rights in the decision-making on amendments to the articles, or can exercise de facto control over the legal person.

Foundations can make distributions to others than the founders, directors and members of other bodies. As profit distributions, these distributions will also fall under the definition of ownership interest. Beneficiaries of a foundation that are entitled to 25% (or more) of the total assets must therefore be qualified as UBOs.

9 UBO IN RESPECT OF LEGAL ARRANGEMENTS (TRUST)

In the case of a trust, the UBWwft provides that the following persons must be regarded as UBOs: the trustees of a trust, the settlor/settlers, the protector/protectors and the beneficiary/beneficiaries of the trust. Other persons who exercise control over the trust in any way, through direct or indirect ownership or through other means, may also qualify as UBOs.

Beneficiaries

If it is not possible to establish the individual persons who are the beneficiaries of the trust, the group of persons in whose interest the trust was primarily set up or operates must be identified as the beneficiary/UBO. For example, there may be such a large group of beneficiaries that it is impossible to identify the individual beneficiaries. It may also happen that individual trustees are not yet in the picture, because the beneficiaries of a trust are determined only in the future. In these cases, it is important that the group of natural persons is described meticulously, based on specific characteristics or by category (for example, if the beneficiaries are “the children and grandchildren”). This must ensure that the individual beneficiaries can be identified after all at a later time: upon payment of the monies managed by the trust, or at the moment when the beneficiary exercises his or her definitive rights.

Trustees

In practice, it is usually professional parties which act as trustee in the context of their profession or business. Therefore, it will often be the case that the trustee is not a natural person, but a legal person or company. If the trustee is not a natural person, the question arises who must be identified as the UBO with regard to the trustee. Based on the role performed by the trustee within a fund trust, it seems to make sense to regard as UBOs the de facto directors (statutory directors) of the legal person acting as trustee. This approach is in line with the system chosen in the Wwft and the UBWwft. On the other hand, a trustee’s degree of control is limited to such an extent as to give rise to the question whether it makes sense to regard the de facto directors of the trustee as UBOs. If this is not the case, the conventional investigation into both formal and de facto control will have to be carried out in order to identify the UBOs of the legal person or company acting as the trustee.

HQ recommends that its members make an informed choice in this respect and document and work out their considerations in the procedures manual or comparable document.

With regard to a trust, the following steps are *mandatory*:

- All UBOs must be identified and their identities verified, and
- Based on contractual obligations, a trust office (which is a trustee or otherwise performs services for the benefit of a trust) must be notified 30 days prior to a change in the entitlement to the trust assets or 30 days prior to the designation of a new beneficiary, so as to give the trust office sufficient time to identify the new (entitlement to the trust office / beneficiary) and verify the identity.

9.1 ORIGIN OF ASSETS INVESTIGATION REGARDING UBO IN RESPECT OF LEGAL ARRANGEMENTS (TRUST)

As indicated earlier, the UBWwft provides that the settlor/settlers, the trustee/trustees, the beneficiary/beneficiaries and the protector/protectors must be regarded as UBOs. Under the Wtt18, however, this means that the financial position and the legitimate source of the assets of all these persons must be established as well.

HQ has the impression that this is not what the legislator intended. A trust is a legal form under Anglo-Saxon law which is used to manage assets of the party that set up the trust (the settlor). That an investigation must be performed into the settlor's financial position and the legitimate source of the latter's assets makes sense in this context. However, an origin of assets investigation in respect of the beneficiary/beneficiaries, trustee/trustees and protector/protectors is not an obvious step: the trustees only manage the trust assets, the beneficiaries will be entitled to the trust assets in due course and the protector sees to it that the trustee correctly fulfils the trust conditions. HQ therefore takes the position that, in the case of a trust, the source of assets investigation does not apply to the trustee/trustees, beneficiary/beneficiaries and protector.

10 ORIGIN OF ASSETS, FINANCIAL POSITION AND INVESTIGATION INTO LEGITIMATE SOURCE

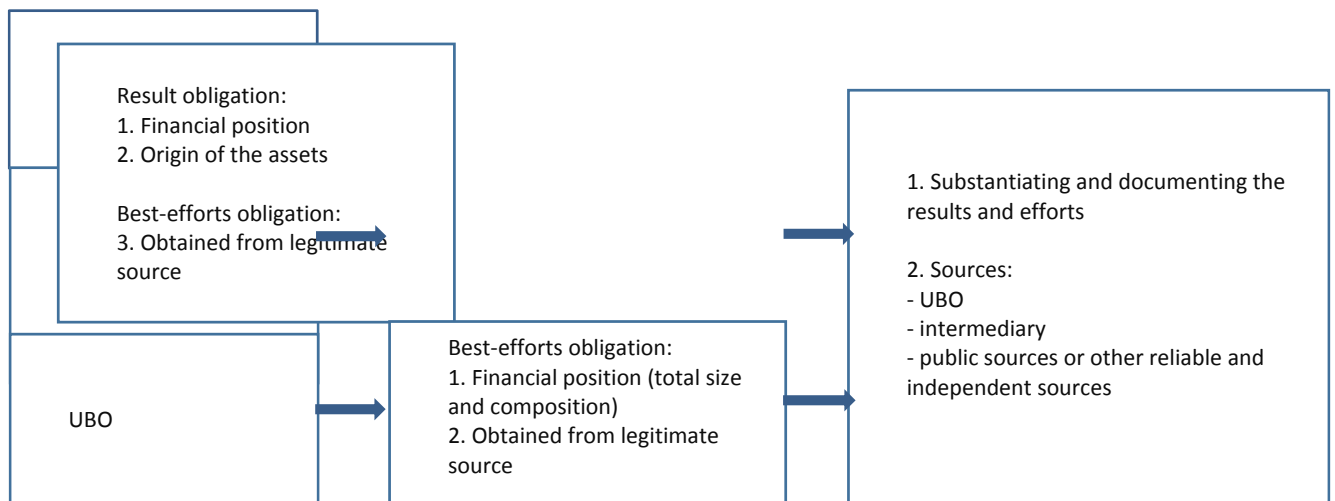
10.1 LAWS AND REGULATIONS

Section 27 Wtt18. Client due diligence review for trust services (a) and (b)

Where the object company is concerned, the review enables the trust office to establish the origin of the object company's assets. To this end, the trust office first identifies the object company's assets and subsequently investigates the origin of those assets. The review comprises all the object company's assets and not just the monies involved in the provision of trust services. Furthermore, no distinction is made between equity capital and debt capital. The origin of the object company's assets must be established with certainty.

In addition, the review enables the trust office to establish the financial position of the object company's UBO with the greatest possible degree of certainty. This review comprises all the UBO's assets, regardless of whether the assets are related to the object company, and the manner in which they were amassed. Where the origin of the object company's assets must be established with certainty, the investigation into the financial position of an object company's UBO or UBOs involves a best-efforts obligation: the financial position of the object company's UBO must be established with the greatest possible degree of certainty. This means that the trust office must arrive at a substantiated indication of the total size and composition of the UBO's assets. To this end, relevant information may be retrieved from the UBO directly, from an intermediary or via public sources.

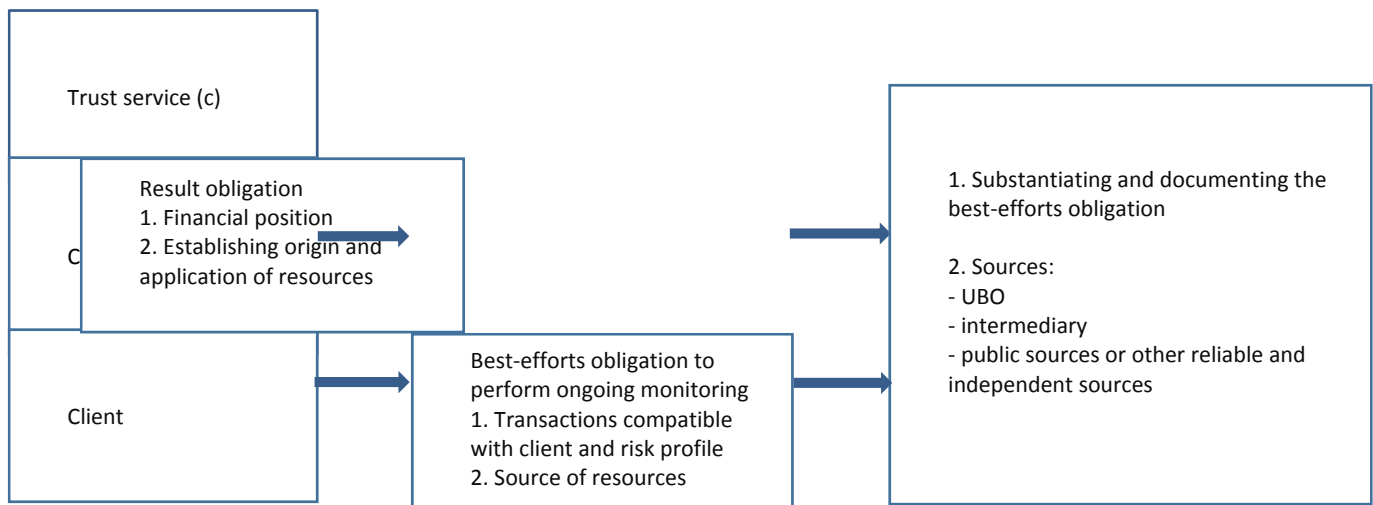
The review enables the trust office to establish with the greatest possible degree of certainty that the origin of the object company's assets and the assets associated with the financial position of the object company's UBO were obtained from a legitimate source. This means that efforts must be made to check the manner in which the assets were acquired and to assess whether the assets originated from criminal practices or otherwise pose a risk to sound and controlled operations. For example, this may involve the circumstance that the assets of an object company or an object company's UBO originate from a country that is subject to international sanctions. In order to determine whether the assets originated from a legitimate source, a trust office will have to ask the client targeted questions, as well as check the information obtained against public sources or other reliable and independent sources. The results of this review, and the efforts made, must be documented.



Section 28 Wtt18. Client due diligence review for trust service (c)

Before entering into a business relationship aimed at providing the trust service, a trust office will perform a due diligence review of the client and the conduit company. This is because a conduit company may be used in order to conceal the origin of resources. Therefore, the trust office must establish the origin and application of the resources made available to the conduit company. This concerns the conduit company's incoming and outgoing flows of money and the rights and obligations obtained or assumed by the conduit company. The trust office must therefore gather and retain the documents underlying the flows of money, rights or obligations. If a loan has been provided, for example, the trust office must establish who bears the risk and what security was furnished in a particular case. The person (entity and UBO) bearing the risk must be identified as well, and this identity must be verified. Where the conduit company is concerned, the review enables the trust office to establish the origin and application of the funds made available to the conduit company.

With regard to the client (in this case, the party using the conduit company), the review enables the trust office to carry out ongoing monitoring of the business relationship and the transactions conducted during the term of this relationship, so as to establish with the greatest possible degree of certainty that these correspond to the trust office's knowledge of the client and the client's risk profile. Where necessary, an investigation must also be performed into the source of the resources used in the business relationship or the trust service. As stated above, what matters in respect of this trust service is the legitimate source of the resources made available to the conduit company. Furthermore, the review enables the trust office to obtain insight into the security furnished in this respect and to establish this security with the greatest possible degree of certainty. Because the trust office thus maps out the relationship between all the parties involved, including the party furnishing security for a loan or bearing risk in other ways, the trust office can determine whether the service provision entails any integrity risk.

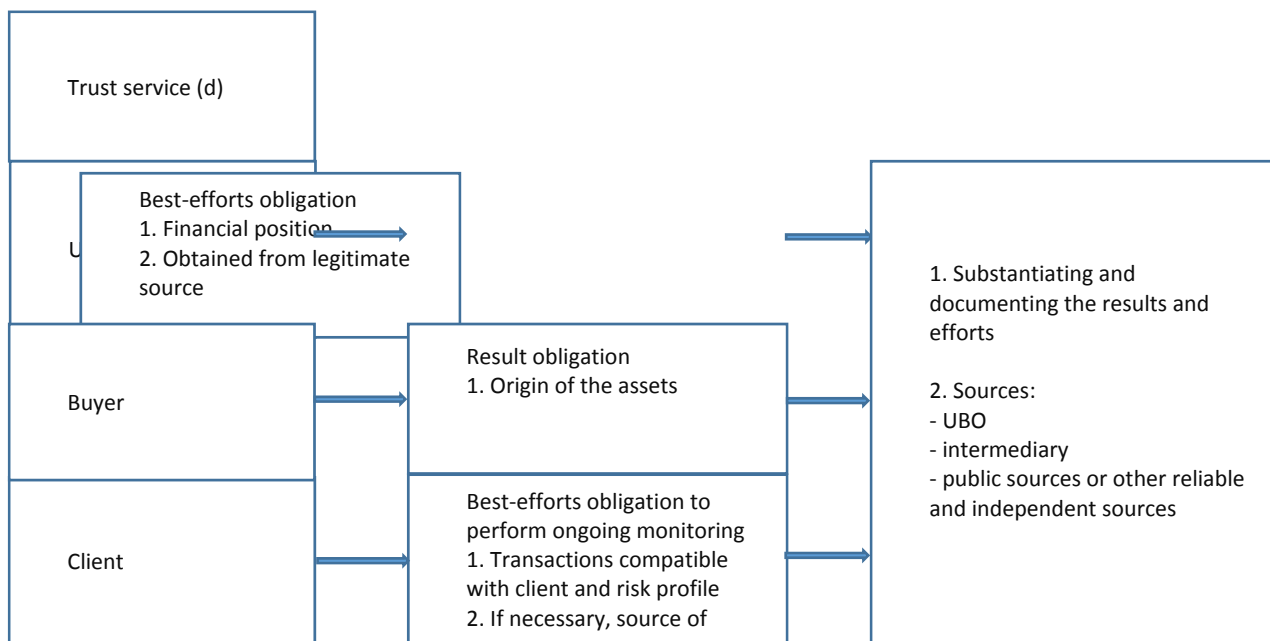


Section 29 Wtt18. Client due diligence review for trust service (d)

Before entering into a business relationship aimed at providing the trust service (d), i.e. selling or acting as intermediary in the sale of legal persons, a trust office will perform a due diligence review of the client and, where applicable, the buyer and the seller of the legal person.

Where the buyer is concerned, the review enables the trust office to establish the origin of the buyer’s assets and examine the financial position of the buyer’s UBO. A best-efforts obligation applies in respect of the UBO’s financial position. The obligation to establish with the greatest possible degree of certainty whether the assets of the buyer’s UBO originate from a legitimate source is a best-efforts obligation as well.

Where the client is concerned, there is ongoing monitoring of the business relationship and the transactions conducted during the term of this relationship, in order to establish with the greatest possible degree of certainty that these are compatible with the trust office’s knowledge of the client and the client’s risk profile, and where necessary investigate the origin of the resources used in the business relationship or the trust service. This involves the legitimate origin of the resources used for the purchase of the legal person.

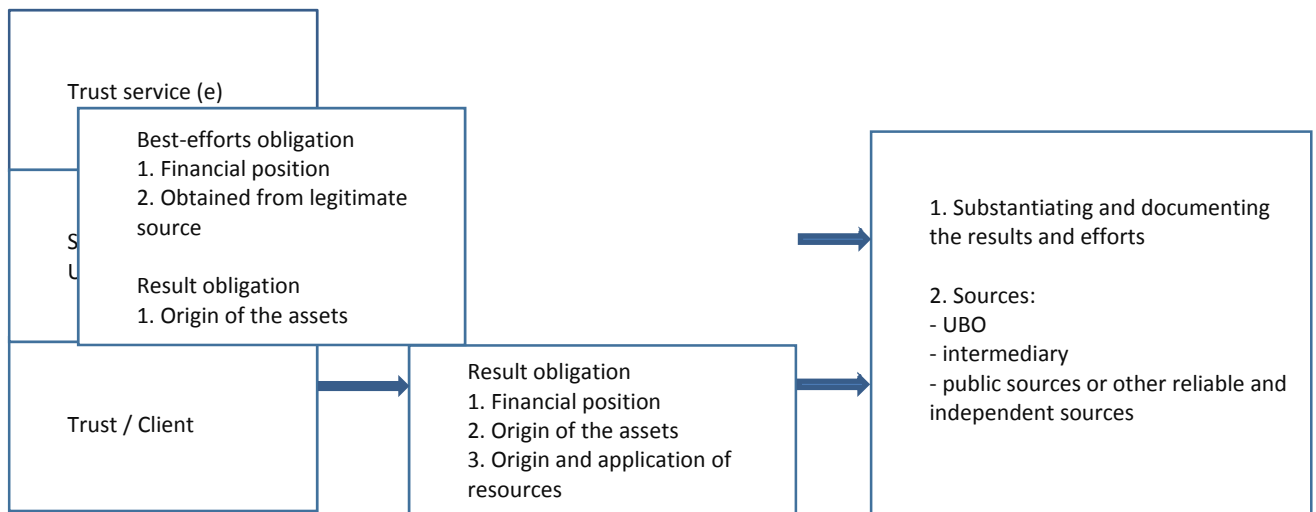


Section 30 Wtt18. Client due diligence review for trust service (e)

This section concerns the provision of trust services referred to under (e) of the definition of ‘trust service’, whereby the trust office acts as a trustee of a trust on the instructions of a natural person, legal person or company not pertaining to the group. In the provision of this trust service, the client due diligence review performed by the trust office comprises both the client (the party issuing the instruction) and the trust.

In addition, it must be observed that there may be circumstances in which, apart from the trust office, other persons or companies also act as trustees of a trust. These trustees must also be identified by the trust office (in the context of establishing the UBOs of the trust). Apart from the trustees of a trust, the settlor/settlers, protector and beneficiaries of the trust are regarded as UBOs as well. Finally, other persons who exercise control over the trust in any way may also qualify as UBOs. See also chapter 9.

Another important point is that the trust office must perform an investigation into the assets of the trust. The trust office must establish the financial position of the settlor, as well as the origin of the trust’s assets and the origin and application of the trust’s resources. These obligations are comparable with the mandatory investigation into the origin and application of the object company’s resources. The obligation to establish the financial position of the settlor of a trust and to assess whether the associated assets originate from a legitimate source is a best-efforts obligation.



10.2 HQ'S INTERPRETATION

The investigation into the origin of the object company's assets is relatively simple. A trust office will be able to determine exactly how many assets the (prospective) object company has as well as the nature of those assets (capital, rights, etc). This knowledge enables the trust office to ask targeted questions.

Determining the UBO's financial position was introduced when the Wtt18 entered into force. This was formerly known as the investigation into the origin of the assets of the UBO. The Wtt18 makes it clear this is not just about the assets involved in the service, but all assets of the UBO. If there is clarity about all these assets, the trust office has to ascertain that the assets originate from a legitimate source. When investigating the financial position, the trust office may first of all ask the UBO him/herself (or his/her representative) questions on the subject. A curriculum vitae, tax return or a profile may all give insight into the financial position. It is important that the UBO is not the only one who is asked questions. Once the information has been received, the trust office will have to investigate, by questioning public and semi-public sources, whether the UBO's statement can be confirmed by the information or indeed whether there are any signs that the statement is incorrect or incomplete. Be alert to the reliability and independence of the sources. A website of a company owned by the UBO is not sufficiently reliable and independent to serve as a verification source of the UBO's own statement.

Once the trust office has gained an adequate idea of the financial position, the trust office will have to investigate whether this financial position has been affected in a legitimate fashion. Largely the same – reliable and independent – sources can be used to that end. The essence of such an investigation is that it is at least plausible that a curriculum vitae or walk-of-life description matches the financial position. A person who for instance has been in the employ of a government service all their life, usually will not all of a sudden have the resources to take over a company.

Financial position

Trust offices have to establish the financial position of a UBO with as much certainty as possible. The law does not provide a definition of financial position. The following definition is given by the Central Government. "Usually, financial position means the ratio between personal assets and debt capital. Enterprises finance their assets and activities by the capital made available by the

shareholders, the so-called 'equity capital', and capital as provided by third party financiers (such as banks), the 'debt capital'." As in the case of UBOs it regards natural persons, we may assume it is about private assets. It will then be about the value of the natural person's property less the value of the debts the natural person has. The word position presumes it is about an approximation of a number. It is inconceivable that it was the legislator's intention that an exact number had to be set that could fluctuate considerably from day to day. HQ advises to express the financial position as exact as possible, but to take the circumstances of the case into account. If Jeff Bezos is your UBO, you could express his financial position in billions, but if the UBO is an SME this will probably be in the order of hundred thousands or ten thousands.

Origin assets in case of pseudo-UBOs

As already indicated in paragraph 3.1.5, HQ is of the opinion that there is no need for an investigation into the origin of the assets in case of a pseudo-UBO. The financial position of the pseudo-UBO is completely unrelated to the business relationship and does not affect the object company's risk profile. HQ considers that the Wtt18 was written before but came into force after the amendment to the Wwft on 25 July 2018. On this point, the Wtt18 has not been sufficiently adapted to the consequences of the pseudo-UBO being introduced in the fourth Anti-Money Laundering Directive. HQ has pointed this out to the Ministry of Finance several times. HQ relies on the Wtt18 being adapted on this point in the near future.

10.3 SUBSTANTIATION FINANCIAL POSITION UBO

As stated above, the UBO's financial position and capital accumulation needs to be established with as much certainty as possible. In that context, it is of importance that the investigation into whether the financial position of the UBO was affected in a legitimate fashion, has to be substantiated as much as possible with information from reliable and independent sources. The overview below shows for each source of equity on the basis of which type of documents the UBO's financial position could be corroborated. Please note that these examples are merely indicative and that it is possible to substantiate the UBO's financial position in other ways.

Origin of assets	Substantiate and document using:
1. Income from paid employment (basic and bonus)	<ul style="list-style-type: none"> ▪ a description of the profession; ▪ the name of the employer(s); ▪ Chamber of Commerce extract when registered as (executive) director; ▪ salary slip / annual income statement(s) ▪ if available: a copy from public sources describing the assets and/or role (news articles, publications in (online) magazines, etc.).
2. Savings	<ul style="list-style-type: none"> ▪ annual bank statements ▪ description of the personal situation proving which financial scope made it possible to accumulate the savings.
3. Inheritance	<ul style="list-style-type: none"> ▪ a copy of the deed(s) of inheritance; ▪ if available: a copy from public sources describing the inheritance (news articles, publications in (online) magazines, etc.).
4. Revenues from investments	<ul style="list-style-type: none"> ▪ audited financial statements; ▪ a detailed description of the investment activities including copies of documents from external sources such as: (historical) copy shareholders' register, financial statements, reference to web pages of the enterprises invested in, etc.
5. Proceeds of the sales of property	<ul style="list-style-type: none"> ▪ a copy of the deed of transfer of the acquisition(s); ▪ a copy of the deed of transfer of the sale(s); ▪ if available: a copy from public sources describing the sale of the property (news articles, publications in (online) magazines, land registry office, etc.).

6. Income from active business operations	<ul style="list-style-type: none"> ▪ the company name(s); ▪ a description of the operating activities; ▪ the registered office and website of the business; ▪ a description of the role executed; ▪ audited financial statements; ▪ if available: a copy from public sources describing the business operations (news articles, publications in (online) magazines, etc.).
7. Income from former business operations	<ul style="list-style-type: none"> ▪ the company name; ▪ a description of the operating activities; ▪ the registered office and website of the business; ▪ a description of the role executed; ▪ audited financial statements; ▪ if available: a copy from public sources describing the income from business operations (news articles, publications in (online) magazines, etc.).
8. Family assets	<ul style="list-style-type: none"> ▪ a copy of (notarial) documents, for instance deeds of inheritance or of transfer of property; ▪ a description of the business operations; ▪ the registered office and website of the business; ▪ a description of the role executed; ▪ if available: a copy from public sources describing the family assets (news articles, publications in (online) magazines, etc.).
9. Different origin	<ul style="list-style-type: none"> ▪ an extensive specification; ▪ if available: a copy from public sources describing the assets [news articles, publications in (online) magazines, etc.].

11 RELEVANT PARTS OF THE STRUCTURE

11.1 RELEVANT PARTS OF THE STRUCTURE

11.1.1 LAWS AND REGULATIONS

Section 27(2) sub (g) of the Wtt18 stipulates that the following needs to be established as regards an object company:

- the ownership structure;
- the formal control structure;
- the relevant parts of the structure of the group to which the object company belongs.

Section 27(2) sub (g) of the Wtt2018 stipulates that it should be established that the obligation to enter the object company, as well as the relevant parts of the structure of the group to which the object company belongs, in the Commercial Register or in a comparable register in another country has been fulfilled;

The Explanatory Memorandum accompanying the Wtt18 states the following on that subject: “This obligation has to counteract concealment by using legal persons or companies that are unknown to the authorities. The check provides the trust office with information on whether the legal persons or companies involved are in any way obliged to be entered in a register and whether this obligation has been met. Not complying with an obligation to register may, in addition to violating the legal obligation in question, also be an indication that the provision of services entails integrity risks. The trust office is expected not to provide any services before an obligation to register has been complied with. The trust office should have a document on file evidencing the registration of the legal persons or companies concerned or that it has been established that in the country of the registered office, the obligation to register does not apply to the legal persons or companies concerned. In case no obligation to register applies to the legal person or legal entity, it may be of particular importance that a trust office finds out what the purpose of the service is and what the reason is for using that particular legal concept in that particular country. The trust office should be aware that the legal concept chosen is unknown to the authorities concerned and therefore may have concealing purposes”.

On the relevant parts of the structure, the same Explanatory Memorandum states: “What is to be understood by a relevant part of the structure depends on the specific case. It should in any case (but not exhaustively) be understood to mean:

- all entities that directly or indirectly have any formal control over the object company;
- all entities that fall directly under the same shareholder(s) as the object company does;
- all entities over which the object company has any formal control, directly or indirectly;
- all entities within the group of the object company which due to the nature of their activities are relevant for the risk profile of the object company or the client”.

“In addition, a trust office is also expected to establish the relevant group structure of an object company (sub g) in all other respects, so that it is aware of the composition of the group of which the object company is part and has the information on which that knowledge is based at its disposal. To that end, the trust office has to have the information relating to the identity of all persons or companies that have formal control over the object company, at its disposal. Apart from that, the trust office will have to know which entities fall under the object company. This relates to entities in which the object company has a participating interest, as well as to entities over which the object company has control (in

other ways). Depending on the structure, it may also be required to include the object company's affiliate companies in this investigation. After all, when the trust office provides services to an object company that is part of a group of which members are involved in risky activities, it is imperative to have clarity on this and include it in the investigation into the integrity risks when providing services."

The investigation into the relevant parts of the structure will coincide in part or in whole with the investigation into the UBOs. Mapping the structure may lead to finding UBOs based on formal control.

11.1.2 PRACTICE

In practice it is unclear how formal control has to be established.

The obligation to establish that both the object company and the relevant parts of the structure of the group to which the object company belongs, have met the obligation to be registered in the Commercial Register or in a comparable register in another country, in practice entails far-reaching obligations.

11.1.3 HQ'S INTERPRETATION

Check registration in Commercial Register

The Explanatory Memorandum to the Wtt2018 states that the purpose of the obligation to check the registration of the object company and other relevant parts of the structure in the Commercial Register, is counteracting concealment by using legal persons or companies that are unknown to the authorities. For carrying out these instructions in practice, HQ argues that there are also other ways of determining whether a legal person or company is known to the authorities. For instance, think of

- Legal persons or companies that are a 100% subsidiary (or 100% sub-subsidiaries or sub-sub-subsidiaries, etc.) of a listed entity. It would have to become clear from the company's annual report that the legal person or company is indeed (indirectly) held for 100% by the listed company.
- Legal persons or companies that are regulated in a jurisdiction within the EU or comparable jurisdictions. Such organisations such as the Financial Conduct Authority and Commission de Surveillance du Secteur Financier keep public registers in which it can be checked whether a legal person or company is regulated in the jurisdiction in question.
- Legal persons or companies that are subject to Country-by-Country reporting.

Formal control

Formal control can be based on equity interest, but this need not necessarily be the case. In order to carry out this instruction in practice and understanding this passage in the Explanatory Memorandum, HQ argues that the formal control should mainly be interpreted as equity interest. As regards the element 'any' in 'any formal control' as mentioned in the Explanatory Memorandum, it is suggested to use lower limits of 5% downwards and 10% upwards, respectively. Among other things because upwards of these values the equity interest also becomes relevant from a tax perspective or it may be relevant in the context of indicating a UBO.

1. Upstream

The object company and how it is held, is the starting point of the investigation into the relevant parts of the structure. A trust office has to know how the structure is built up from the level of the object company up to the natural persons having an ownership interest in the structure. In principle, a trust office should map all layers in between the object

company and the UBO. After all, someone can also be a UBO as a result of an aggregate interest of 25% or more. As the UBO limit value has become fluid, it may be wise to interpret this range wider. For instance, think of a lower limit of 10% or more. This will enable the trust office to explicitly assess each natural person having an ownership interest of between 10% and 25%, to see whether this person, apart from an interest, also has control to such an extent that they should be considered a UBO. That way it is easier for the trust office to prove that they have met their best efforts obligation to identify all UBOs and takes account of the basic principle of the Wwft/UWBWwft that a pseudo-UBO is a fallback option and that appointing a 'genuine' UBO is preferable.

2. Downstream

Usually, exposure to integrity risks takes place via the operational activities taking place in the operating companies. A trust office therefore needs to know how the structure is built up from the object company up to the entities having operational activities (whether there no longer are any further participating interests on the balance sheet of the participating interest). HQ recommends using a limit value. For instance the limit value of at least 5% or more, that applies in the Dutch Corporation Tax Act 1969. After all, 5% is the limit value for qualifying as participating interest or not. That means that an interest of 5% or more can be relevant and therefore must be considered a relevant part of the structure.

Considered from the object company, all entities in the first layer that form part of the object company are mapped. The entities in which the object company holds an interest of 5% or more, are mapped in the next layer. Also pay attention to those situations in which the object company functions as director in a participating interest. And subsequently, further layers as regards the entities in which 5% or more is held. Contrary to the upstream investigation, there is no 'dilution' in a downstream investigation. Every 5% in each layer is relevant and may also result in the situation that the object company holds a 5% interest in underlying entities until the entity no longer holds an interest of 5% or more in another entity. When assessing these entities, the existence of any risk factors should be looked at (for instance relating to countries, operating activities, sectors of industry).

3. Side stream

The purpose of the upstream investigation is mapping the natural persons that are direct or indirect shareholders. The downstream investigation particularly regards those entities having operational activities. Regarding entities that are situated 'next to' or 'elsewhere' in the structure, the starting point is that, in principle, these entities can be disregarded unless these entities are of importance in, for instance, intra-group transactions.

12 MANDATORY INFORMATION EXCHANGE INCLUDING CHECKLIST

12.1 LAWS AND REGULATIONS

Prior to providing its services, the trust office, pursuant to Section 68 of the Wtt18, is obliged to examine whether another trust office is providing or has provided services to the client or the object company.

12.2 PRACTICE

Not every trust office uses the same method or priorities in respect of meeting the above-mentioned obligation. This may lead to the provision of services being delayed.

12.3 HQ'S INTERPRETATION

To come to a uniform method within the trust sector, HQ suggests using the following step-by-step plan:

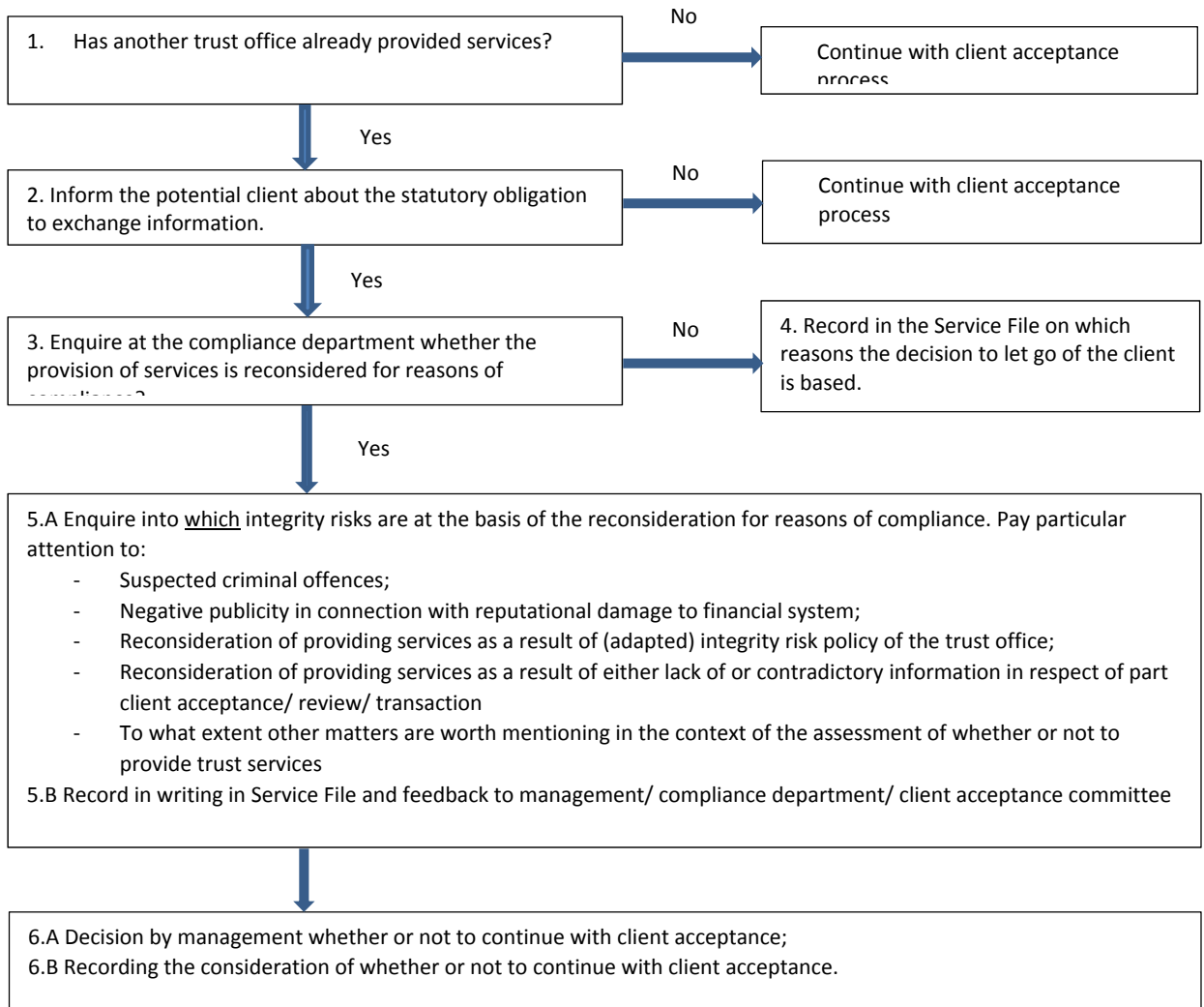
1. As part of the client acceptance, the trust office examines whether another trust office is providing or has provided services to the client or the object company.
2. If such is the case, the trust office informs its potential client about the legal obligation to exchange information under Section 68 of the Wtt18;
3. Subsequently, the account manager (or compliance officer) contacts the compliance department/compliance officer of the trust office formerly providing services to enquire into whether the trust office is letting go or has let go of the client for reasons of compliance/integrity.
4. If the trust office formerly providing services is not letting go or has not let go of the client for reasons of compliance/integrity, the reasons for which the provision of services was terminated must be recorded in the service file.
5. Insofar as a client/object company is/has been let go of on the basis of compliance/integrity reasons, the trust office will enquire at the trust office formerly providing services into which integrity risks were at the basis of the latter taking the decision not to provide trust services (any longer) to the client or object company concerned.

In view of this, the trust office will particularly verify whether:

- there are (suspected) facts under criminal law and if so, which (suspected) criminal offences it regards;
 - reconsideration takes place on the basis of (amendments to) the integrity policy of the trust office concerned and if so, on which material grounds the reconsideration is based;
 - there is negative publicity that may result in reputational damage to either the Dutch financial system or the trust office or the trust sector and if so, on which facts and/or circumstances such negative publicity is based;
 - insofar as reconsideration of the provision of services is related to obtaining either insufficient or contradictory information or documentation, which part of the client acceptance this relates to and which information it regards?
6. Based on the information obtained and recorded, the management and/or client acceptance committee makes an assessment whether or not to continue with the client acceptance and records the decision including the considerations in that connection in the service file.

If and insofar as the trust office at which enquiries are made, does not provide its cooperation immediately (within five workdays of the request for exchange of information being submitted), the trust office will send a written demand to the trust office to be made enquiries at, stating the consequence that if a substantive response is not forthcoming (within three workdays), an incident report will be made to the regulator.

Schematic overview:



13 INTEGRITY RISK ANALYSIS OF THE CLIENT

13.1 LAWS AND REGULATIONS

Section 14(3) of the Wtt2018 indicates that for the purpose of a sound and controlled conduct of its business, a trust office periodically performs an analysis of the risks for sound business operations. Such a periodical analysis is also known as the systematic integrity risk analysis (SIRA). The SIRA is the basis of sound and controlled business operations. In the SIRA all risks are identified, analysed and assessed. Policy, procedures, processes and control measures are based thereon and implemented. Periodically reviewing the SIRA is necessary in order for the SIRA to continue being the basis for the trust office's sound and controlled business operations. Review may take place on a regular basis or when there is reason to do so.

Section 27(2) sub (a) of the Wtt18, indicates that the trust office is obliged to prepare an integrity risk profile about the object company on the basis of the client due diligence. If there is no object company or if the object company and the client are not one and the same, this obligation also applies to the client.

The integrity risk profile and the transaction profile are both based on the client due diligence but must be expressly distinguished from one another.

The integrity risk profile relates to the occurrence of integrity risks. What integrity risks are, is defined in Section 1 of the Wtt18. In short, it is about the trust office's involvement in *contra legem* or *contra bonos moros* activities of the object company and/or client, that means a contravention of the law as well as activities that are socially improper.

Explanation: "The integrity risk profile describes the circumstances that may affect the integrity risk attached to the object company. This could for instance include possible integrity risks as a result of the UBO's country of origin, the object company's country of establishment, the market on which the object company is active and the nature of the object company's activities."

13.2 HQ'S INTERPRETATION

HQ advises its members to make a clear distinction between risks, control measures and the materialisation analysis (in other words: likelihood and impact) when preparing a SIRA. These are often confused in practice; for instance the consequences of control measures being absent are taken into account as risks.

An example of a few scenarios that may be included in a SIRA are stated below.

Risk	Scenario	Likelihood	Impact	Control
Money laundering	The object company is used for concealing the origin of criminal proceeds (money laundering).	The structure protects the UBO. Dividends are distributed by the participating interest. Participating interest is active in cash business. Likelihood: realistic.	Undermining the social integrity. Impairment of the financial sector's reputation. Interventions towards the client and/or trust office under administrative or criminal law: impact heavy.	Client has no authorisation with respect to the object company's bank account. The financial statements of the object company are audited by a respectable party.
Tax avoidance	The object company is part of a structure that is not transparent from a tax perspective (tax avoidance).	The structure uses entities from jurisdictions that do not take part in AEOI regimes. The purpose of the structure is to separate legal title and beneficial ownership. Likelihood: highly realistic.	Erosion of tax revenues of one or several states. Undermining public interest. Impairment of the financial sector's reputation. Financial or custodial sanctions. Impact: heavy.	Evidence that is conclusive and originates from an independent source indicating that at all levels complete openness is pursued towards the relevant tax authorities.
Social impropriety	The object company has an interest in an operational company that may be involved in the deforestation of the Amazon region.	The participating interest is active in the processing and export of tropical woods to Europe. Likelihood: realistic.	Contributing to the destruction of human and animal habitats. Contributing to climate problems. Socially debatable activity. Impact: average.	Participating interest takes part in certified quality marks, providing a sufficient guarantee.
Social impropriety	The object company is part of a structure in which interest and royalties received from Europe are passed on to Guernsey via the Netherlands.	It becomes clear from the tax advice that this is the client's intention. Likelihood: certain.	Reputational damage to the Netherlands. Erosion of tax payments elsewhere in Europe. Impact: average.	As from 1 January 2021, the Netherlands will introduce a charge on such outgoing tax payments. Business economic reality is in line with the corporate structure.

Feasible risks in terms of non-compliance with any statutory provisions are: money laundering, terrorist financing, swindling, fraud, tax evasion, active and passive corruption, bribery, leaking or unlawful processing of privacy sensitive information etc.

Feasible risks in terms of involvement in socially improper behaviour are: aggressive tax planning, conflicts of interest, climate change, destruction of human and/or animal habitats, destruction of biodiversity, exploitation of humans and/or animals, pollution of (surface) water, political activism, etc.

Integrity Risk Appetite Framework (IRAS)⁸ and SIRA

An important part of sound business operations is the Integrity Risk Appetite Statement (IRAS). In short, an IRAS describes the range within which a trust office wants to do business or wants to provide services. In the IRAS, the trust office describes well-considered decisions pertaining to accepting and avoiding integrity risks. The IRAS describes which services, products, markets and clients you do and do not wish to serve based on a perceived integrity risk.

The SIRA elaborates on the IRAS but is far more in-depth. For each product, service, market or type of client, the trust office analyses in which way scenarios relating to specific integrity risks might occur. On the basis of these scenarios, the trust office analyses how likely it is that they will occur and what the impact, if any, will be if the risk does materialise. The outcome of this analysis results in a gross risk. Said gross risk must be compared with the risk appetite you have formulated in the IRAS. You can either avoid, unconditionally accept or conditionally accept (mitigate) gross risks. In most cases, conditional acceptance (acceptance after implementing mitigating measures) will be opted for.

Subsequently, you describe which measures there are with which you could limit or mitigate the risk, and most of all whether such measures are effectively put into effect. The trust office then defines the net risk and the net risk is also compared with the risk appetite stated in the IRAS.

Client integrity risk analysis

The integrity risk profile is closely connected to the SIRA or as DNB formulates it: translating SIRA into the individual client files. At client level and the individual client risk analysis level, the first question is whether the client fits within the integrity risk appetite. If so, the client is analysed on the basis of the same risk indicators as those named in the SIRA. To what extent the scenarios named in the SIRA apply to the client can be looked into, as well as which choice goes with it in terms of acceptance. With the integrity risk profile, the SIRA provides a parameter according to which the individual client can be judged and states which mitigating measures this specific client requires at a minimum.

Risk profile



The outcome of the integrity risk analysis of the client results in a risk profile. Generally speaking, three or four possible results are worked with (for instance: medium, high, very high, unacceptable). This outcome is definitive for the periodicity of the periodic review/reassessment. High-risk files will have to be subjected to a reassessment more often and (in accordance with the mitigating measures) will naturally require more attention and capacity.

Tolerance

The client portfolio should suit the trust office and the extent to which the business operations are equipped to overcome the integrity risks. It is possible to have a 100% high-risk portfolio on the condition that there is a suitable control framework. However, having a more balanced portfolio is advisable. It is *good practice* to formulate a so-called 'risk tolerance' in the IRAS. A correct description of the risk tolerance is a sign of a mature organisation in control of its activities and clients. A risk tolerance may for instance include a limit to the total number of high-risk clients, or the total number of PEPs or a restriction on a channel, market or type of client (depending on the nature of the activities or geography).

Risk Management Framework

⁸ Also see FSB: http://www.fsb.org/wp-content/uploads/r_131118.pdf



The Risk Management Framework as required on the basis of current legislation, must be incorporated into the existing business operations and that is why it is necessary to continuously adapt the IRAS and the SIRA on the basis of what happens in individual files, or on the basis of the trust office's changing activities or changed legislation. In any case, it will be best to review the SIRA annually. The IRAS could also be reviewed following events taking place in politics or society.

14 CONTENTS ACCEPTANCE MEMORANDUM

14.1 LAWS AND REGULATIONS

Pursuant to Section 26(3) of the Wtt18, an 'acceptance memorandum' is available for each client. This obligation is based on Section 23 of the old Regulations Governing Sound Operational Practices under the Trust Offices (Supervision) Act. In this memorandum, the results of the client due diligence and the investigation into the associated integrity risks, including the extent to which these risks are overcome by the control measures, are described in relation to each other. The memorandum should at least answer the questions whether (1.) the statutory requirements of the client due diligence have been met and whether (2.) the service fits within the IRAS frameworks and the policy it is based on. A trust office must refuse or terminate the provision of trust services in case of actual integrity risks or if the trust office cannot ascertain to a sufficient extent whether the integrity risks have been overcome. The acceptance memorandum should be seen as an umbrella analysis.

14.2 PRACTICE

In practice it is unclear in what way this obligation has to be fulfilled. There is also a debate about the moment at which an acceptance memorandum should be prepared: merely when the provision of services is started with or (also) in the course of the regular review of the client file.

14.3 HQ'S INTERPRETATION

Who

In principle, the responsibility for the acceptance memorandum lies with the management. After all, the intention of the acceptance memorandum is contributing to an internalised culture of integrity and that the management shows ownership for the clients accepted under their responsibility. Depending on the size of the portfolio and the procedures that usually apply to client acceptance, it seems arguable and practical that in case of larger trust offices, the responsibility for preparing the memorandum is placed with the body within a trust office that is the highest decision-making body as regards client acceptance. Particularly in case of the larger trust offices this could be a client acceptance committee, whereas in case of smaller offices the management will often be the body in question. The Wtt18 leaves room for this and the starting point can also be diverged from on the basis of the Explanatory Memorandum. A client acceptance committee, or a body within the trust office comparable thereto, could for instance record the meeting reports or minutes in a memorandum format. In case of smaller offices, the management decision can usually also be a part of the client acceptance memorandum.

Contents

From the Act and the Explanatory Memorandum it follows that the acceptance memorandum should consist of the following elements:

- a. Results from the client due diligence, including the purpose of the trust services.
- b. Assessment whether those services involve integrity risks.
- c. Establishing whether the client due diligence resulted in the prescribed result (statutory standards), in other words whether the integrity risks have been satisfactorily overcome.
- d. Establishing whether serving the client under consideration (purpose of the business relationship/purport of the structure) is desirable from a policy perspective and is wise from a moral/ethical perspective. In other words, a manifest assessment in relation to social propriety.

The acceptance memorandum must be a document that can be read on its own. All the same, it may refer to other documents.

The following information must be included in the memorandum:

i. Results client due diligence:

Particular attention is meant to be paid here to the investigative elements: purport of the structure and purpose of the business relationship, information about the UBO. What does the client wish to achieve and does the purport of the structure under consideration fit within that purpose? It is of importance here to explicitly name which services the trust office carries out as this will already provide an indication of the mitigating measures to be taken additionally.

ii. Integrity risks:

Which risk indicators result in there being question of a regular or high risk. Do these risk indicators relate to the degree of control by the trust office (authorisation with respect to the bank account, director A or B) or rather to the prevention of integrity risks. In what way are the identified risks mitigated? Trust offices should beware of the fact that in practice the integrity risk analysis is usually referred to, whereas this is a separate document.

iii. Assessment formal result:

Confirmation of the fact that the client acceptance committee or the management checked that all investigative obligations were met to a sufficient extent and that all required profiles were prepared.

iv. Assessment against the policy:

The policy based on the integrity risk of social propriety has to be applied as well. This policy in any case comprises the general CSR policy and the specific Tax Integrity policy. The memorandum also states why the client fits within this policy and why it is socially sound to accept the client, referring the purpose of the business relationship and the purport of the structure.

For the purpose of inspiration, an example statement:



The undersigned, in the capacity of director of Trust Office AAA, established that the client due diligence has led to the prescribed result or that an exhaustive effort has been made to gather information. The client due diligence shows that the object company serves as [HOLDING COMPANY] for the investments of [MULTINATIONAL] in [JURISDICTION]. Due to the use of the Dutch object company, the investment falls under the scope of the bilateral investment treaty (BIT) concluded between the Netherlands and [JURISDICTION]. This client is considered a high risk due to the fact that the operational activities take place in a high-risk sector and [JURISDICTION] moreover has a low CPI score. I am of the opinion that the control measures taken sufficiently mitigate this risk and that in fairness we are able to prevent ourselves from getting involved in contra legem activities. In conformity with our CSR policy, the operational activities cannot be deemed activities which by nature or organisation may be considered socially improper. The structure of which the object company is part, does not have constructs which, on the basis of the Tax Integrity policy, need to be excluded nor does it show any indications of aggressive tax planning. Therefore, I conclude that, as the statutory requirements of investigation and risk management have been complied with and the services fit within our CSR and TI policies, this client can be accepted and the object company can be served.

Signatures.

[NAME AND SIGNATURE DIRECTOR TRUST OFFICE AAA]

v. Preparation of files and transitional law:

The acceptance memorandum is added to the service file. An acceptance memorandum is prepared for new clients as from 1 January 2019. For existing clients, an acceptance



memorandum is prepared to finalise the periodical review (also see the guidance in connection with the transitional law).

vi. Standing obligation:

This is a standing obligation: in case of a reacceptance review or if in the course of providing services incidents or material changes occur in the structure or if the nature of the service provision changes, a new acceptance memorandum will have to be prepared including a decision as regards the continuation of the business relationship or the provision of services.

15 TRANSITIONAL LAW

15.1 LAWS AND REGULATIONS

As from 1 January 2019, the Wtt18 and its underlying rules apply in full to all regulation elements of the Wtt2018 with the exception of the client due diligence. As regards the client due diligence, the entry into force of the revised Wwft on 25 July 2018 introduced a parallel arrangement. This is incorporated in Section 74 of the Wtt18. The transitional law is particularly relevant now that the PEP definition and UBO definitions have changed significantly.

Clients accepted under the regime of the (old) Wtt need to be “converted” to the standards of the client due diligence (chapter 4) of the Wtt18. According to Section 74 of the Wtt18 this must take place:

- a. the first time the client contacts the trust office, or
- b. on such earlier date as the trust office considers it has reason to have the client due diligence take place, taking the integrity risk associated with the type of client, object company, business relationship or trust service into account.

From the explanation accompanying the Act, it becomes clear that trust offices are obliged to update the client due diligence already performed into these existing clients, at the earliest convenience. The new stipulations provided for by the Wtt18 will then have to be observed. This means that trust offices when performing the client due diligence have to take the amendments to the stipulations relating the client due diligence into account, including the new content given to the terms UBO and PEP. The trust office must give risk-based content to the term “at the earliest convenience”. The trust office should actively get in touch with the client so that the trust office has the opportunity to take (additional) client due diligence measures. In those cases in which a higher risk occurs, a trust office may be required to get in touch with the client immediately.

The client due diligence will in any case have to be updated:

- a. if the relevant circumstances of a client change,
- b. if, on the basis of the Wtt18, a body is obliged to contact the client to assess information relating to the UBO, or
- c. if a body is obliged to do so in the context of administrative cooperation in the field of taxes.



15.2 PRACTICE

The way in which the Wtt18 and the Explanatory Memorandum have been formulated do not seem to be entirely mutually consistent. The Wtt18 seems to start from the idea that as soon as the client gets in touch, the client due diligence has to be updated immediately, whereas the Explanatory Memorandum clearly places the initiative of the update with the trust office.

15.3 HQ'S INTERPRETATION

HQ is of the opinion that regarding updating client files, taking the risk-based starting points of the legislation into account, the following priorities can be set:

- **Priority 1:** Existing client acceptance files (service files) in which no UBO has been identified. Considering the major change in the definition of UBO, ascertaining the identity of a UBO now is an obligation in all cases.
- **Priority 2:** Existing client acceptance files (service files) with a PEP in this country. Usually, a trust office will know about this as these names have already emerged as PEPs from the



systems. Insofar as this has not been done already, they now need to be formally considered a PEP, the tightened measures need to be taken and the files have to be adjusted accordingly.

- **Priority 3:** Following the periodical review cycle. The existing client acceptance files (service files) that are not affected by the changes stated above, have to be converted in conformity with the current review cycle. All high-risk files have priority, followed by medium-risk files and the low-risk files coming last.

Naturally, the trust office will always have to monitor whether the relevant circumstances of the client change. Relevant circumstances are circumstances that may affect the risk profile (but not necessarily have to). For instance, think of a structure change in the group of which the object company is part (including a change of the UBO) or transactions if they are not within the defined transaction profile and require a reassessment of the client and adaptation of the profile.

16 RELATION BETWEEN THE WTT18, THE GENERAL DATA PROTECTION REGULATION (GDPR) AND THE DUTCH STATE TAXES ACT (DSTA) (SECTION 52)

16.1 WTT18 VERSUS GDPR

16.1.1 LAWS AND REGULATIONS

From the legislation follows that there is no conflict between the stipulations of the Wtt18 and the General Data Protection Regulation, as preventing the financial system from being used for money laundering or terrorist financing is acknowledged as a compelling, public interest within the meaning of the personal data protection legislation.

Subject to strict conditions, a compelling, public interest enables making exceptions to specific bans and orders necessary to protect personal data. The fourth Anti-Money Laundering Directive (AMDL) pays explicit attention to this. The personal data are processed to prevent the financial system from being used for money laundering and terrorist financing. Effectively combating money laundering and terrorist financing would not be possible without carrying out client due diligence. In order to be able to recognise signals indicating, among other things, money laundering and terrorist financing, acquiring knowledge and information about the identity of a client and UBO is indispensable. This information is also essential to the functioning of the (Dutch) investigation authorities. At the same time, processing personal data needs to remain restricted to what is required for compliance with the obligations under the Wtt18.

The processing of personal data by a trust office pursuant to the Wtt18, qualifies as processing based on a statutory duty within the meaning of Section 6(1) sub (c) of the General Data Protection Regulation. Trust offices process personal data within the context of their duty to perform client due diligence. As a consequence of the amendment to the Wwft on 25 July 2018, the definitions of UBO and PEP have changed and become broader and therefore personal data of more people have to be collected.

The five-year retention period (as from the moment a business relationship has been terminated or a trust service has been provided) applicable to the personal data collected on account of the client due diligence, remains unchanged. Once those five years have passed, the personal data have to be destroyed immediately. The trust office is not allowed to further process the personal data collected in the context of the client due diligence for a purpose that is incompatible with this compliance purpose.

The Wtt18 provides for an obligation for trust offices to enquire into integrity risks established with regard to a client, at other trust offices previously providing the relevant client with trust services. This obligation applies at the start of a business relationship and when providing trust services. A trust office requesting such information, or responding to such a request for information, will at that point process personal data. This obligation therefore results in an increase in the processing of personal data. Preventing that the trust services are provided to a client who was previously considered to entail uncontrollable risks, necessitates the exchange of information about the integrity risks associated to a client. Exchanging this information enhances the effectiveness of the gatekeeper function carried out by trust offices. It enables trust offices to make a proper assessment of a request for providing services. This interest outweighs the privacy interest of the parties involved. In the legislative proposal, a specific ground is incorporated for the processing of personal data of a criminal nature.

Integrity risks established could be related to (suspected) criminal offences. These details could be the reason for refusing service provision to the client. In case this client subsequently requests services from another trust office, that trust office should be able to have all the information at its disposal on the basis of which the previous office made its assessment. It is of importance that a trust office is obliged to inform its clients of the statutory obligation before entering into a business relationship or providing a trust service. This provides for a necessary guarantee for the protection of the personal data concerned. It is furthermore relevant that the obligation only sees to the integrity risks that became apparent after this legislative proposal came into force.

Under the DSTA (Dutch State Taxes Act) a retention obligation of at least seven years applies. This retention period also applies to data that are relevant for tax purposes and indicated in Section 20 of the Fiscal Administrative Law Decree. These data in any case include:

- the general ledger;
- the stock records;
- the accounts receivable records;
- the accounts payable records;
- the purchase records;
- the sales records;
- the payroll records.

Apart from these general basic details, there are more specific basic details that are especially of importance to the taxation of third parties (see Section 53 of the DSTA). In this context, think for instance of:

- the credit files at banks;
- the client files at auditors in public practice and tax advisers.

The other details of an administration are not considered basic details by the Dutch Tax and Customs Administration.

16.1.2 PRACTICE

The legislator does not specifically address the relation between the Wtt18 and the DSTA. Whereas the Wtt18 is rather clear in its instructions to destroy personal data five years after terminating the business relationship, the DSTA has a retention obligation of at least seven years.



16.1.3 HQ'S INTERPRETATION

The term 'Personal Data' as defined in Section 4 of the GDPR is relevant to the retention period in the Wtt18.

“personal data”: any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Therefore, it regards data about natural persons on the basis of which they have been or could be identified.

On the basis of this analysis, HQ concludes that in principle there is no conflict between complying with the Wtt18 and the DSTA. The retention period as referred to in the Wtt18



starts running as from the moment the business relationship is terminated. Details relating to natural persons (such as a curriculum vitae, financial position, copies of identity documents) have to be destroyed 5 years after terminating the business relationship. In principle this does not regard details that are relevant for tax purposes. The details that are relevant for tax purposes have to be retained at least 2 years longer (exceptions possible).

17 GIVING CONTENT TO THE INTERNAL COMPLIANCE FUNCTION

17.1 LAWS AND REGULATIONS

Section 15 of the Wtt18 requires a trust office to have an independent and effective compliance function. The compliance function is aimed at monitoring the trust office's compliance with statutory regulations and the trust office's own internal rules. Section 16(2) of the Wtt18 furthermore includes a ban on the outsourcing of carrying out the compliance function. In addition, Section 17(4) of the Wtt18 requires that the number of hours a compliance officer spends on carrying out the compliance function every week, matches the number of clients the trust office has, the nature of its activities and the integrity risks associated thereto.

In the Explanatory Memorandum and the subsequent Memorandum of Amendment, the following explanation was given:



- The present legislative proposal provides for a ban on trust offices outsourcing the compliance function. Pursuant to Section 7(6) of the Regulations governing Sound Operational Practices under the Trust Offices (Supervision) Act 2014, trust offices were explicitly allowed to outsource this function. The ban intends to improve giving content to the statutorily required compliance function by trust offices. This is in line with the observations made by the Parliamentary questioning committee Fiscal constructs. This ban also ties in with the observations made by DNB. It appeared that giving content to the compliance function falls short in many cases. In those cases in which an external compliance officer was engaged by a trust office, DNB on several occasions found that the actual performance of this function fell short or was even dispensed with. In these cases, the checks by the external compliance officer were not carried out, or not often enough or only at the trust office's request, for instance in the run-up to a DNB investigation. For an effective performance of the compliance function and safeguarding the internalised integrity culture, it is of importance that the compliance officer has a proactive attitude and is continuously capable of fulfilling his duties effectively.
- For a compliance function to be effective, it must be properly embedded in the organisation. The function must be fulfilled continuously, it must be capable of checking actions at any time and be able to advise the trust office management on imperfections.
- In addition, holding the function internally has several advantages for the effectiveness of monitoring compliance. A permanent element within an organisation has more knowledge of the processes and relationships within an organisation, it has better access to information and is capable of acting more readily within the organisation.
- Referring to the above-mentioned explanation, the reason for the ban on outsourcing is the shortcoming found by DNB that the compliance officer is not continuously and structurally involved with the trust office concerned.

17.2 PRACTICE

The larger trust offices will usually employ one or several (fulltime) inhouse compliance officers. However, considering their nature and size, smaller trust offices have a different need as regards fulfilling the compliance function. Actually, having a compliance officer on their payroll is neither efficient nor effective for such offices.

17.3 HQ'S INTERPRETATION

The type of contract (employment contract, secondment contract, contract for services) is not the guiding principle here but rather the compliance officer's structural involvement. The latter can be affected by the contract between the compliance officer, or the company supplying the compliance officer, respectively, stating the number of hours the compliance officer is active for the trust office on a weekly basis. Active in this case means being present at the client's office but



also the availability when not actually present at the office. Then, the trust office needs to have it internally laid down and also needs to assess periodically that the number of hours agreed on – in relation to the trust office’s risk profile, the organisational structure and the number of service files – continuously enables the compliance officer to perform his/her duties effectively. It must also be laid down and corroborated that the compliance officer has actually been effectively at the trust office’s disposal for the number of hours agreed on.

Furthermore, the compliance officer job requirements for the members of Holland Quaestor apply, which correspond to the requirements of DSI, affiliation with which is mandatory as from 1 January 2020 (currently already possible on a voluntary basis). This implies training requirements, periodic assessment and disciplinary law.