BUREAU FINANCIEEL TOEZICHT

Specific guideline on compliance with the Wwft for accountants, tax advisors, administrative firms and all other institutions referred to in Section 1a(4)(a) and (b) of the Wwft (24 October 2018)

Contents

1. Introduction

The Fourth European Anti-Money Laundering Directive (Directive EU 2015/849 of the European Parliament and of the Council, hereinafter also referred to as the 4th Directive) was adopted on 20 May 2015. This Directive was implemented on 25 July 2018 by means of an amendment to the Money Laundering and Terrorist Financing (Prevention) Act (Wwft).

The Ministry of Finance and the supervisors of the Wwft draw up general and specific guidelines to assist these institutions in applying the Wwft in practice.

This specific guidance has been adapted as a result of the aforementioned legislative amendment [1]. The concepts of customer due diligence (CDD) and the reporting obligation are discussed in detail in the general guideline. The Ministry of Finance will be amending the general guideline in connection with the amendment of the Wwft.

This specific guideline discusses specific points of attention for auditors, tax advisors and administrative firms (all 'institutions' within the meaning of the Wwft) that are important for compliance with the Wwft. The relevant professional organisations (the Dutch Association of Tax Advisers (NOB), the Dutch Register of Tax Advisers (RB), the Netherlands Association of Accounting and Tax Experts (NOAB) and the Netherlands Institute of Chartered Accountants (NBA)) have been consulted on this specific guideline.

The main changes from the specific guideline issued in 2014 are as follows:

- the terrorist financing component has been extended (section 3.5);
- a new section has been added on customer due diligence, in particular on identifying the BO (Chapter 4);
- changes with regard to simplified and enhanced CDD (sections 4.6 and 4.7 respectively);
- risk policy and risk management (section 4.8);
- compliance and audit function (chapter 5);
- Sanctions Act (chapter 6);
- updating examples of unusual transactions (chapter 7).

The examples of the subjective indicator have also been adapted (Annex 1).

2. Inventory of existing information

Following the entry into force of the Wwft, the Ministry of Finance drew up a manual for lawyers, civil-law notaries, auditors, tax advisors and administrative firms setting out the CDD and the reporting obligation in ten steps [2].

This roadmap has been updated and now consists of a general roadmap and a risk policy roadmap (Annex 2).

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[1] The present guideline builds on the specific guideline drawn up by the Financial Supervision Office (BFT) in July 2014. The first specific Wwft guideline for accountants, tax advisors and administrative firms offices was published by the BFT in April 2011. [2] An initial outline of this roadmap is included in the article 'Nieuwe anti-witwaswetgeving van kracht!
Veel nieuws onder de zon?', *TOP 2008, episode 6* (September 2008), D. Kaya, D.S. Kolkman, LL.M., B. Snijder-Kuipers and A.T.A. Tilleman, LL.M. This roadmap was updated in 2013, TOP 2013, May 2013, pages 98-103.

The Financial Supervision Office (BFT) provides information under the Wwft via www.bureauft.nl.

The FIU-the Netherlands reports on the number of unusual transactions as well as the types of transactions in its annual report.
Since June 2010, the FIU-the Netherlands has also distributed newsletters to relations. These newsletters include trends and developments relating to the obligation to report unusual transactions. Case positions are also published on the website of the FIU-the Netherlands.

The professional organisations (in particular NOB, RB and NBA) actively inform their members about the obligations under the Wwft as well as about relevant case law. The professional organisations answer questions of members about practical situations. Comprehensive Guidelines [3] have been drawn up for implementation practice and are periodically updated. At the same time, a model risk policy has been drawn up that enables members and non-members to map out their risk policy. In the light of the continuing training obligation under Article 35 of the Wwft, the NOB, NBA and the RB, among others, have developed e-learning modules. These e-learning modules enable members and non-members alike to test their practical knowledge of the Wwft and to fulfil the periodic training obligation.

3. Money laundering and terrorist financing

3.1. Definition of money laundering

Money laundering has several definitions. Generally speaking, money laundering can be described as the mixing of illicit financial flows with legal financial flows, with the aim of giving the illicit financial flows legal status. Money laundering is an independent offence under Articles 420bis, 420ter, 420quater and 420quinquies of the Dutch Penal Code [4].

The various methods of money laundering generally included three phases [5]:

a) The (non-cash) transfer of assets acquired through crime ('placement');
b) The stacking of (financial) transactions in order to conceal the criminal origin of the assets ('layering');
c) The integration of assets into the legal economy ('integration').

For a description of money laundering methods (and money laundering channels) please refer to the specific guideline of the BFT from 2014 and to section 4.2. of the National Risk Assessment Money Laundering 2017, carried out by the Scientific Research and Documentation Centre of the Ministry of Justice and Security (WODC). which sets out the following money laundering methods [6]:

- Money laundering by means of payment (cash, virtual currency, prepaid payment cards)
- Money laundering via money laundering structures (loan-back structures, stacking of legal persons, offshore structures, ABC structures, investment structures)

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[3] NBA Guidance document 1124 'Guidelines for tax advisors and accountants on the prevention of money laundering and terrorist financing', June 2014.
[4] Entered into force on 14 December 2001, Act of 6 December 2001, Bulletin of Acts and Decrees/606.
[5] J.L.S.M. Hillen, LL.M., Schuurman & Jordens, Integriteits- en anti-witwaswetgeving, 2004 third printing, introduction to the Disclosure of Unusual Transactions (Financial Services) Act, pp. 132 and 133
[6] https://www.wodc.nl/onderzoeksdatabase/2689c-nra-witwassen-1.aspx.

- Trade-Based Money Laundering (TBML) [7];
- Disguising the identity by using straw men and fronts,
- Misuse of foundations.

3.2. Definition of money laundering under criminal law

Since 14 December 2001, money laundering has been an independent offence under Articles 420a, 420ter 420c and 420quinquies of the Penal Code.
Case law on the criminal-law concept of money laundering has evolved considerably in recent years. The judgment of the Supreme Court of 28 September 2004 shows that it is sufficient to prove that money has (presumably) originated from crime in order to have a suspect convicted of money laundering. In this judgment, the Supreme Court ruled that it is not necessary to be able to infer from the evidence (a) that the object in question is the result of a precisely identified offence and (b) by whom, when and where that offence was actually committed[8].

On 7 October 2008 the Supreme Court[9] ruled that tax fraud is a form of money laundering. It follows from the judgment that money laundering has taken place if the money originates from tax fraud

On 26 October 2010, the Supreme Court[10] ruled that mortgage fraud also falls within the scope of the money laundering provisions. The suspect had bought a house using false salary specifications and took out a mortgage. The Supreme Court in this case ruled that, in addition to fraud and forgery of documents, the suspect had also committed money laundering.
In the same judgment, the Supreme Court indicated that there are conceivable cases in which the concept of 'money laundering' should be limited, because the money launderer is required to carry out an act aimed at securing his criminal proceeds[11].

On 8 January 2013, the Supreme Court issued a number of important rulings[12] on the scope of the money laundering provisions. The Supreme Court reiterates the framework of its ruling of 26 October 2010.

As of 1 January 2017, the series of rulings on the acquisition or possession of sums of money that derived from serious offences committed by the suspect himself while no actions intended to hide or conceal were taken, came to an end. As of 1 January 2017, 'simple money laundering' was made punishable under Sections 420bis and 420quater of the Penal Code.

3.3. Money laundering and the reporting obligation pursuant to Article 16 of the Wwft

The purpose of the Wwft is to combat the laundering of proceeds of crime and terrorist financing in order to guarantee the integrity of the financial and economic system. Customer due diligence and the reporting obligation form the core of the Wwft.

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7 TBML relates to national and international commercial transactions effected to transfer value or legitimise value increases/decreases where it is unclear whether the transactions are related to a flow of goods, what the origin of the flow of goods is and whether there is a flow of goods. TMBL involves overbilling and underbilling in (international) trade flows or turnover and/or price manipulation. See WODC report
8 ECLI:NL:HR:2004:AP2124.
9 ECLI:NL:HR:2008:BD2774.
10 ECLI:NL:HR:2010:BM4440.
11 ECLI:NL:HR:2010:BM4440, sub 2.4.2.
12 ECLI:NL:HR:2013:BX4605, ECLI:NL:HR:2013:BX6909, ECLI:NL:HR:2013:BX6910, ECLI:NL:HR:2013:BX4449 en ECLI:NL:HR:2013:BX4585.

It is not necessary for the institution itself to establish whether money laundering has taken place in the criminal sense or whether all three phases of the money laundering process have been completed. It is sufficient for the institution to recognise and report unusual transactions to the FIU-the Netherlands[13]. Two objective indicators and one subjective indicator exist for independent professionals to deem a transaction to be unusual. See the 2018 Wwft Implementing Decree for more details.

Objective indicators
"Transactions of €10,000 or more paid to or through the independent professional in cash, bearer cheques, a prepaid payment instrument (prepaid card) or similar means of payment."

This concerns both cash receipts and/or payments by the independent professional. The situation where an independent professional does not accept the cash but accompanies or refers his customer to the bank to deposit the money into his account is also covered by the objective indicator. After all, this is a transaction through the intervention of the independent professional. The Amsterdam Court of Appeal ruled in two higher appeal cases that the deposit of cash by the customer into an institution's account is also subject to the reporting obligation, regardless of whether the institution was actively involved in this transaction. See the Amsterdam Court of Appeal, 1 November 2007[14] and the Amsterdam Court of Appeal, 21 August 2008[15].

The second objective indicator is as follows:
"A transaction by or for the benefit of a legal or natural person residing or established or having its registered office in a state that has been designated as a state with a higher risk of money laundering or terrorist financing in delegated acts of the European Commission pursuant to Article 9 of the fourth Anti-Money Laundering Directive also comes under the objective indicator[16]."

According to the website of the FIU-the Netherlands, the following also constitutes an objective indicator: *"It is fair to assume that transactions reported to the police or the Public Prosecution Service in connection with money laundering or terrorist financing should also be reported to the Financial Intelligence Unit;"* after all, there is a presumption that these transactions may be related to money laundering or terrorist financing.

All transactions that meet the objective indicators should be reported. There is no room for the institution to conduct a further assessment. This is different for the subjective indicator. Depending on the facts and circumstances, the institution will have to assess whether there is reason to assume that the transactions may be related to money laundering or terrorist financing.

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13 See also ECLI:NL:CBB:2015:363. In ECLI:NL:CBB:2015:363, the Trade and Industry Appeals Tribunal (CBb) inter alia rules that the threshold for reporting is low.
14 ECLI:NL:GHAMS:2007:BB8704.
15 ECLI:NL:GHAMS:2008:BE9100.
16 Consulthttps://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/anti-money-laundering-and-counter-terrorist-financing_en#eulegalframeworkonamlctf As of September 2018, this concerns the following countries: Afghanistan, Bosnia Herzegovina, Guyana, Iraq, Laos, Syria, Uganda, Vanuatu, Yemen, Iran, North Korea, Sri Lanka, Trinidad and Tobago, Ethiopia and Tunisia.

Subjective indicator
"Transactions where the obliged entity has reason to assume a possible link with money laundering or the financing of terrorism".

Annex 1 sets out a number of general points of interest that can serve as a tool to assess whether an unusual transaction has taken place (e.g. relevant factors relating to certain countries, customer identification, financial transactions and legal persons/structures). Annex 1 also contains specific guidelines for the professions.

3.4. FATF report legal professionals

In June 2013, the Financial Action Task Force (FATF) adopted the report 'Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals'[17].

According to this study, legal service providers - including civil-law notaries, accountants and tax advisors - run the risk of being exploited or abused by criminals who want to launder money. The purpose of the FATF report is to determine how legal service providers may be involved in money laundering. In addition, indicators for suspicious transactions - 'red flags' - have been established. These red flags should improve the ability of legal service providers to recognise practical situations and prevent them from becoming involved in money laundering. The FATF report notes that a significant majority of legal service providers act in compliance with (anti-money laundering) legislation and resulting obligations. However, it is inherent in the work of the legal service provider that there is a significant risk of involvement in money laundering. The report identifies the following methods:

- misuse of the client account;
- carrying out real estate transactions;
- setting up companies or holding companies;
- managing companies or holding companies;
- guiding customers' affairs and referring customers to third parties;
- acting in disputes.

3.5. Definition of terrorist financing

Terrorism is defined as the pursuit of objectives or the performance of acts designed to intimidate the population or part of the population of a country, or to unlawfully compel a government or an international organisation to do, refrain from doing or tolerate something, or to seriously disrupt or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. This usually takes place through violence (or the threat of violence) directed against people's lives.

Section 83 of the Penal Code sets out which punishable conduct constitutes a terrorist offence. Article 421 of the Penal Code criminalises terrorist financing.

[17] http://www.fatf-gafi.org/documents/documents/mltf-vulnerabilities-legal-professionals.html; http://www.om.nl/actueel/nieuws-persberichten/@161089/fatf-stelt-rode/

Terrorist financing is in fact a collective term for various acts, the ultimate aim of which is to make terrorist activities financially viable.

Article 1(1) of the Wwft refers (for the definition of terrorist financing) to Article 421 of the Penal Code.

For the purposes of the Wwft, terrorist financing is considered to be:

"any person who intentionally provides himself or another with information or intentionally collects, acquires, holds or supplies objects to another person, all or part of which is intended, directly or indirectly, to provide pecuniary support for the commission of a terrorist offence or an offence in preparation for or facilitation of a terrorist offence."

According to the above definition, terrorist financing exists even if the funds and other assets are not actually used to commit terrorist acts or if they are not even directly linked to terrorist acts.

The reporting obligation under the Wwft does not require the institution itself to determine whether any terrorist acts actually take place. The obligation to report has a low threshold[18].

Indeed, the origin and use of the money in the context of money laundering is often the reverse of that with respect to terrorist financing. In the case of money laundering, the origin of the money is by definition illegal and a legal use is sought, while in the case of terrorist financing the funds are used for criminal purposes, but the origin is often legal. The same channels used for money laundering will also often be used to finance terrorist acts[19].

4. Customer due diligence, risk policy and risk management

An important part of the customer due diligence is to establish the identity of the beneficial owner and to verify his identity[20]. An important amendment to the Wwft, which entered into effect on 25 July 2018, is the broader scope of the concept of BO (Beneficial Owner):

- though the percentage of more than 25% of the shares or voting rights is indicative, a BO might also exist in other cases;
- in exceptional cases, a member of the senior management (the director or directors under the articles of association) may be regarded as a BO, even if this person does not have an equity interest.

In practice, the change results in a more extensive CDD and the obligation that a BO must in principle ***always*** be established. Only in the case of listed companies and wholly-owned subsidiaries does no BO exist[21].

18 See also ECLI:NL:CBB:2015:363.
19 House of Representatives, session year 2007-2008, 31238, number 3, page 2.
20 The other CDD obligations, such as determining the power of representation, the monitoring obligation, investigations into the origin of the funds used in the transaction, etc., are not discussed further below.
21 2018 Wwft Implementing Decree, p. 23.

4.1. Definition of Beneficial Owner

The general part of the definition of 'beneficial owner' is provided in Article 1 of the Wwft. An beneficial owner is a natural person who ultimately owns or controls a customer or the natural person on whose behalf a transaction or activity is carried out. Article 3 of the 2018 Wwft Implementing Decree elaborates on the definition of BO for the various legal forms. The further elaboration of the definition of BO determines which persons should at the least be regarded as a BO. This is emphatically not an exhaustive enumeration of a customer's possible BOs. It will always be necessary to judge, on the basis of the criteria given in Article 1 of the Wwft, whether other persons should also be designated as BO.

A natural person may be a BO by directly or indirectly holding more than 25% of the shares of the voting rights or of the ownership interest in the company including bearer shares. Granting a right of usufruct on the voting right or pledging the voting right may result in the pledgee or usufructuary having to be regarded as a BO of a company. However, a natural person can also be a BO in other ways. Examples include cases where a natural person, as a shareholder, has the right to appoint or dismiss the majority of the directors of a company, irrespective of the percentage of shares held. Another example concerns natural persons who, on the basis of an agreement with the company, may exercise dominant influence over the company, as may be the case, for example, in the case of beneficial ownership.

In practice, voting agreements are often concluded when multiple shareholders exist. These voting agreements may be relevant to the CDD, particularly if they contain mutual agreements on how votes are to be cast at shareholders' meetings. Obtaining shareholder agreements can also be helpful in determining the BO. If, for example, the most important shareholder decisions are taken by the same persons, this may be an indication that they have de facto control over the customer.

If it is not possible to identify a natural person who ultimately owns or controls a legal person through the holding of shares, voting rights, ownership interest or other means, the senior management of the legal person should be designated as BO.
According to the explanatory notes to the 2018 Wwft Implementing Decree, the designation of senior management as a BO is explicitly a fall-back option: senior management can only be designated as a BO if all possible measures have been taken by an institution to determine a customer's BO on the aforementioned grounds and if there are no grounds for suspicion of money laundering or terrorist financing. If there are grounds for suspicion of money laundering or terrorist financing, an institution is obliged under the Wwft to refuse or terminate its services because the requirements of the CDD cannot be met.

The fall-back option to designate senior management as a BO must be used as a (rare) exception because the BO is usually a natural person who holds shares, voting rights or an ownership interest in a legal person. In case of doubt about designating someone as a BO, the natural person who owns or controls the company takes precedence over the senior management: otherwise, the exception would become the main rule[22].

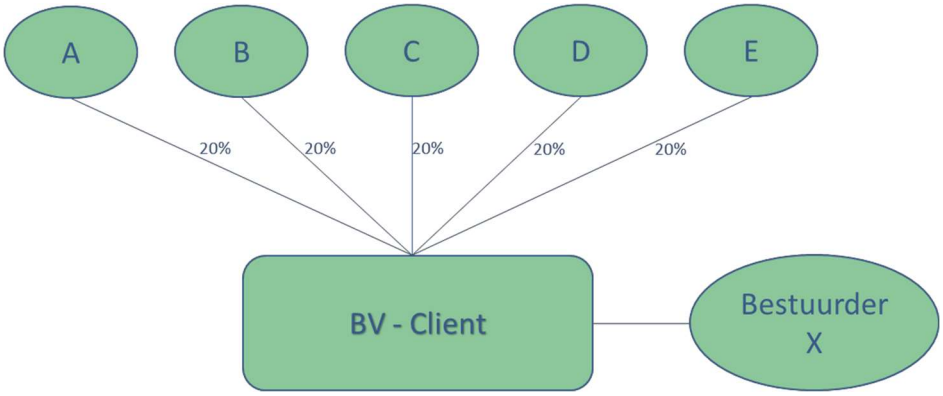
By means of examples, this guideline provides further guidance on how to go about identifying the BO for the various legal forms (legal persons, companies or other legal persons). The institution must always determine for itself, on the basis of the individual facts and circumstances, which person or persons have been designated as a BO and lay down the reasons for this in writing (Article 33 of the Wwft).

4.2. BOs in private limited companies and public limited companies[23]

The BOs of a private or public limited company or similar legal person are primarily natural persons who hold more than 25% of the shares, voting rights or an ownership interest in a company. At the same time, this does ***not*** mean that natural persons who hold a lower percentage of shares, voting rights or ownership interest in a company cannot be regarded as BOs. If these persons have ultimate control in a company in any other way, for example on the basis of contractual relations, they also qualify as a BO on the basis of the criteria referred to in Article 1 of the Wwft.

A few examples are given to explain which person or persons qualify as BO. It is emphasised that the BO must be determined on a case-by-case basis and that the examples are case-specific.

Example 1 Family business



The following is explained in the diagram above. Persons A to E each hold 20% of the shares in PLC-Customer. The director at PLC-Customer is of course person X. The concrete question is who qualifies as a BO in the above diagram.

[22] Page 29 of the explanatory notes to the 2018 Wwft Implementing Decree states that senior management may only be regarded as a BO if all possible measures have been taken by an institution to determine a customer's BO on the grounds referred to earlier.

[23] Article 3(1)(a) of the 2018 Wwft Implementing Decree.

Persons A to E each hold no more than 25% of the shares in PLC-Customer, so no one can be directly designated as a BO. The institution must check whether one of the persons has effective control in PLC-Customer in any other way. This could be on the basis of contractual relations, for example. Or it could be based on the fact that the dismissal of the director requires the approval of persons D and E only. If that is the case, persons D and E each qualify as BO.

When assessing who qualifies as a BO, the institution can request or consult the following information:

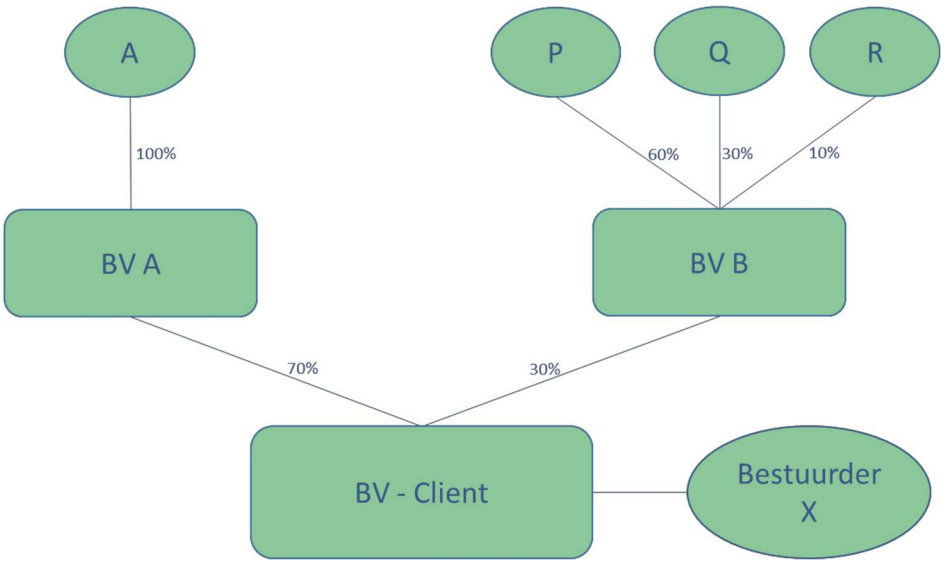
- voting agreements. If, for example, it is laid down in voting agreements that D will always vote in the same way as E, this actually means that E has an interest of 40% and can therefore be considered a BO.
- shareholder agreements. Shareholder agreements may contain further information that is important to assessing whether a person is a BO.

- interview with the management. The management may be asked to state who actually sets the policy.

In many family businesses, the father has traditionally set up the company and the children work at the company and gradually receive shares.

It is important that an institution records the measures that have been taken to trace a customer's BOs. This follows from Article 33 of the Wwft [24]. If, after extensive investigation, it turns out that no BO can be determined on the basis of ownership or control or that none of the shareholders has actual control in some other way, director X may be regarded as the BO.

Example 2 Indirect shareholding[25]

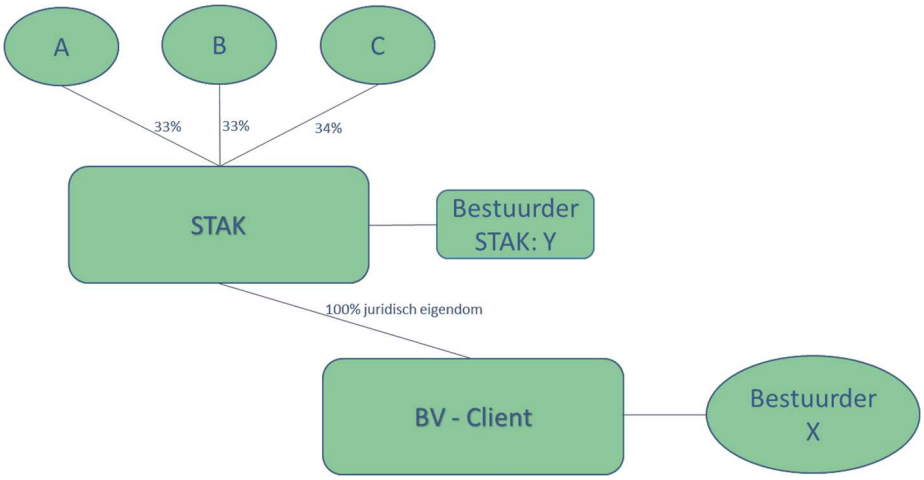


[24] 2018 Wwft Implementing Decree, p. 29.
[25] Example taken from the NOB, NBA and RB Guidelines, June 2014.

PLC-Customer has several shareholders. A qualifies as a BO in PLC-Customer, as he holds more than 25% actual control in PLC-Customer via BV A. In this specific case, P also qualifies as a BO of PLC-Customer, because P has a decisive influence on the voting behaviour of the 30% interest in PLC-Customer.

Not just natural persons who directly hold more than 25% of the shares, voting rights or ownership interest in a company should be considered as a BO. Even if the ultimate ownership or control in a company is held indirectly, for example via another legal person, such as a trust office foundation, or an arrangement of legal persons, a natural person should be regarded as a BO. This may, for example, concern natural persons who qualify as the BO of a trust office foundation holding the shares in a company. Article 3(6)(a)(i) of the 4th Directive provides that holding more than 25% of the shares or of the ownership interest in a company through a legal person controlled by the same natural person or persons is indicative of an indirect ultimate interest in a company.

Example 3 Trust office foundation



The legal ownership of PLC-Customer is held through a trust office foundation. Legal and economic ownership are separated in a trust office foundation. The legal ownership of the shares (and therefore the voting rights) rests with the foundation. Economic ownership rests with depositary receipt holders A, B and C, holding 33% and 34% of the certificates, respectively.

In the example above, A, B and C each qualify as a BO. The director of the trust office foundation (Y) may also qualify as a BO if he has decisive influence through the foundation and can determine the policy in PLC-Customer (including determining when the profits accrue to the depositary receipt holders)[26]. The persons who qualify as a BO will have to be determined on a case-by-case basis, depending on the articles of association and the agreements with the depositary receipt holders.

[26] See page 28 of the 2018 Wwft

4.3. BOs at other legal persons (churches, associations, mutual insurance associations, cooperatives and foundations[27])

4.3.1. *Churches*

Article 3(1)(b) and (c) of the 2018 Wwft Implementing Decree fleshes out the concept of BO in more detail for churches and other legal persons. By virtue of Article 2(1) of Book 2 of the Dutch Civil Code, churches have legal personality. Natural persons who are at any rate to be regarded as BOs of a church are those natural persons who, on dissolution of the church, have been appointed as legal successors in its articles, such in view of a potential ownership interest of these natural persons. In addition, in line with the 4th Directive, under certain circumstances the natural persons listed as directors in the articles of the church or in the documents of the ecclesiastical organisation must, as a last resort option, be regarded as BO of the church. For this latter category of natural persons basically corresponds to the senior management of a legal person that must be classified as a BO of a legal person under the 4th Directive.

4.3.2. *Associations, mutual insurance associations, cooperatives and foundations*

The natural persons who ultimately own or control the legal person may be regarded as BO of an association, mutual insurance association, cooperative or foundation by:

- directly or indirectly holding more than 25% of the ownership interest in the legal person;
- directly or indirectly exercising more than 25% of the voting rights in respect of resolutions relating to amendments to the articles of association of the legal person; or
- the ability to exercise effective control over the legal person.

Here, too, a possible fall-back option exists. If no BO can be traced or if there is no real BO and there are no grounds for suspicion of money laundering or terrorist financing, the senior management is considered to be the BO.

The explanatory notes to the 2018 Wwft Implementing Decree state that a foundation has legal personality in the Netherlands and is more comparable in form and function to Dutch legal persons than to trust and company service providers. As a result of these changes, the natural person or persons who directly or indirectly hold more than 25% of the ownership interest in the foundation must, among others, be deemed to be BOs of the foundation. Since a foundation has legal personality, a natural person will not have a direct ownership interest. In exceptional cases, where the assets of the foundation must be used for the benefit of a limited number of persons, these could be BOs.

In many cases, where the foundation has an ideological or social objective, it will not be possible to designate a BO directly and the fall-back option will apply. This means that the chairman of the foundation's board (being the senior management) must be regarded as the BO.

[27] Article 3(1)(a) of the 2018 Wwft Implementing Decree.

4.3.3. *Trust office foundation*

In the case of a trust office foundation, the legal and beneficial ownership is split. The beneficial ownership rests with the depositary receipt holder, the legal ownership (and therefore the voting rights) with the foundation. The depositary receipt holder is not entitled to the assets of the foundation, but only to a right or share in the profits of the legal person the foundation manages. The depositary receipt holder is the economic owner of the underlying shares. The depositary receipt holder may qualify as a BO if the depositary receipts held by him represent a capital interest of more than 25%. Under certain circumstances, the director of a trust office foundation can also be regarded as a BO of the underlying company if he can actually determine its policy (see example 3 under 4.2. above).

4.4. Partnerships (professional partnerships, general partnerships, and limited partnerships)

Article 3(4) of the Wwft stipulates how the CDD of partnerships must be carried out. Examples of partnerships include the professional partnership, general partnership, and limited partnership. In the case of partnerships, no shareholder interests exist, but ownership interests do. As with legal persons, one or more BOs will always have to be identified in the case of partnerships.

4.5. Foreign legal forms (Trusts, Limited Companies, Private Foundations, etc.)

In the case of foreign legal forms, one or more BOs must be identified in a similar way as applies in the case of domestic legal forms. This section is relevant even if a foreign legal person is not the customer, but a customer is held through the intermediary of a foreign legal person. Some specific cases relating to foreign legal persons are briefly discussed below.

4.5.1. *Limited (nominee shareholder and director)*

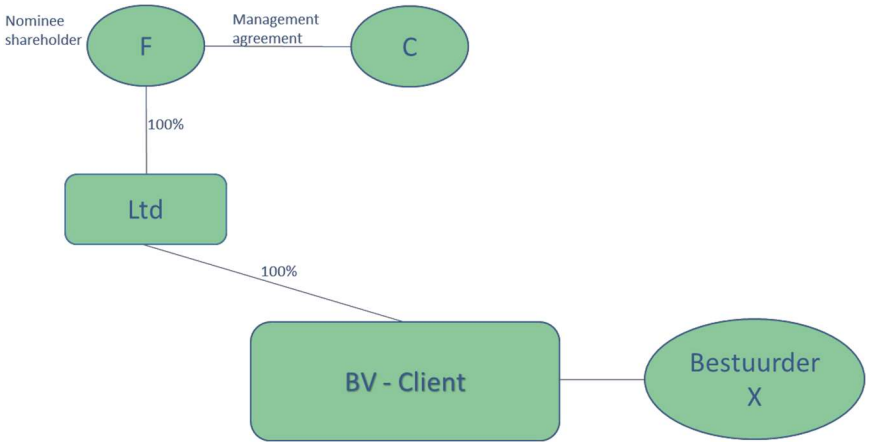
The BO must also be determined in the case of foreign legal forms such as Limited (Ltd.), S.A. or AG. This can be done by obtaining information from the company register or from the customer's register of shareholders. Information may also be obtained from other institutions that are involved in the transaction and required to conduct customer due diligence (e.g. a civil-law notary or lawyer or bank).

In practice, use is sometimes made of 'nominee shareholders' (shareholder in name) and also of 'nominee directors' (director in name).

The registered shareholder (nominee shareholder) holds the shares of one company for another, namely the customer, who has instructed the company to do so. A separate private agreement listing the arrangements made - a so-called management agreement - is generally concluded for this purpose. The nominee shareholder is not the legal and economic owner of the legal person. That is the actual shareholder, who is both the legal and beneficial owner of the shares[28]. Many offshore arrangements use nominee shareholders to shield the identity of the actual owner.

[28] De offshore wereld ontmaskerd, Dr T.J. van Koningsveld, LL.M., p. 39/40ISBN 978 90 6720-

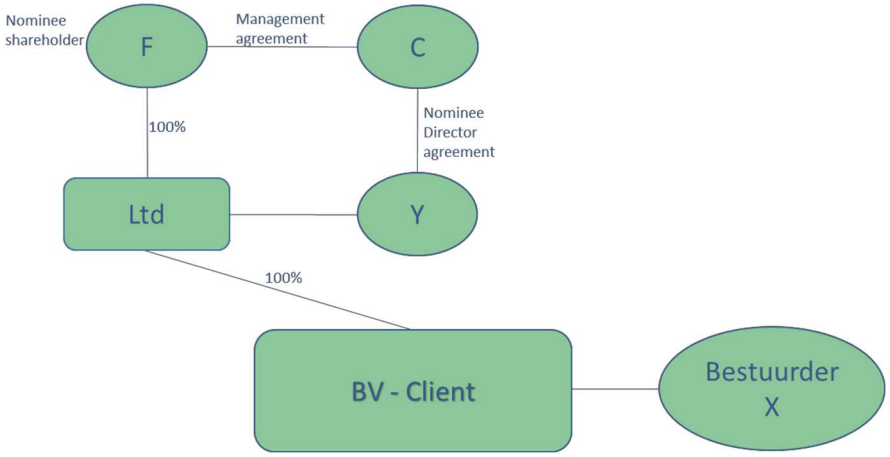
Example 4 Nominee shareholder



F is the nominee shareholder of PLC-Customer. C has concluded a management agreement with F. In order to complete the CDD, the institution may request submission of the management agreement. The management agreement states the identity of the principal. C qualifies as the actual BO because he has actual control over PLC-Customer.

In the case of concealing structures, C's identity may also be screened off via another foreign legal person. The institution must in such case find out who is hiding behind this legal person. It is also possible that C appoints a nominee director, e.g. Y, who sees to the daily management and operations of the Ltd. Y receives an annual fee for these work activities, and his name is mentioned in official documents such as the Chamber of Commerce listing, invoices, contracts, bank authorisations and tax returns. Employees of trust and company service providers or of law firms could also be appointed as nominee directors[29].

Example 5 Nominee director and shareholder



[29] De offshore wereld ontmaskerd, Dr T.J. van Koningsveld, LL.M., p. 39/40ISBN 978 90 6720-

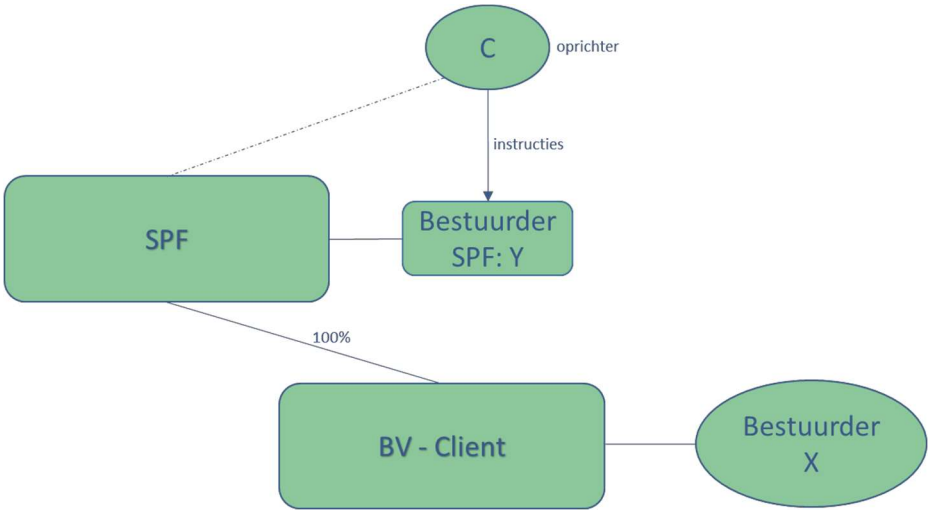
An institution can find out who the actual BO is by, for example, obtaining the nominee director agreement. This document indicates who gives the actual instructions, in this example C.

4.5.2. *Private foundations*

A private foundation is a special type of foundation, often established under the laws of Curaçao or Sint Maarten. The private foundation must be set up by a civil-law notary by notarial deed. The advantage of using a private foundation is that the settlor can structure the foundation himself. For example, the settlor can give instructions to the board about making distributions from the assets of the foundation. The private foundation differs from a trust and company service provider (TCSP) in that it has its own legal personality and is therefore the independent legal owner of assets. A private foundation is often established, for example, in the context of estate planning, protection of family wealth and limitation of liability. The private foundation is often charged with investment and holding activities, or with the holding of real estate. A private foundation may not actually engage in any business (i.e. perform activities that go beyond normal asset management).

The articles of association are described in the deed of incorporation. A private foundation has no share capital. The private foundation is not subject to a ban on distributions such as applies to Dutch foundations. Money can therefore be paid out to the settlor or settlors. The private foundation must have a director or attorney who is a resident of Curaçao or Sint Maarten.

Example 6 Private foundation



A private foundation can also be misused to disguise the beneficial owner (or assets). The articles of association of the private foundation do not state who has contributed money or goods, only the name of the director or directors. Instructions to the board are often laid down in a private deed. The settlor may also indicate that certain persons are entitled to the assets of the private foundation by means of a "letter of wishes".

If an institution has a private foundation as a customer, the institution must carry out the customer due diligence as described in Article 3(5) of the 2018 Wwft Implementing Decree (a private foundation is a legal arrangement similar to a TCSP). Article 3(1)(e) of the 2018 Wwft Implementing Decree inter alia stipulates that the following persons should be deemed to be the

BO of a TSCP:

1°. the settlor or settlors; 2°.
the trustee or trustees;
3°. where applicable, the protector or protectors;
4°. the beneficiaries or, to the extent that the individual beneficiaries of the express trust cannot be determined, the group of persons in whose interest the express trust is primarily constituted or operates; and
5°. any other natural person who ultimately exercises control over the TCSP through direct or indirect ownership or by other means.

In the case of a private foundation, the settlor can in any case be regarded as a BO. By obtaining the agreements between the board of the private foundation and the principal, the institution can check who gives the actual instructions. The actual customer is regarded as the BO for the application of the Wwft (in this case, C). The beneficiary or beneficiaries mentioned in the letter of wishes may also be regarded as BOs of the private foundation.

4.6. Simplified customer due diligence

The 4th Directive, unlike the Third Anti-Money Laundering Directive, leaves no scope for listing cases where simplified customer due diligence can take place. Institutions should determine whether simplified customer due diligence suffices on the basis of a risk assessment, to be conducted prior to entering into a business relationship or carrying out an occasional transaction. Article 6 of the Wwft requires institutions to take account of the risk factors in Annex II to the 4th Directive in order to assess whether there is a lower risk of money laundering and terrorist financing justifying the performance of simplified customer due diligence[30]. This Annex gives the following (non-exhaustive) list of factors and types of evidence of potentially lower risk:

1. Customer-related risk factors:

- listed companies[31] that are subject to disclosure requirements (under stock exchange regulations or by legal or enforceable means) which include requirements to ensure adequate transparency regarding beneficial owners;
- governments or public enterprises;
- customers resident in lower-risk geographical areas (see below in point 3).

2. Product, service, transaction or supply channel-related risk factors:

- life insurance policies with a low premium;
- pension insurance contracts that do not contain a surrender clause and cannot serve as security;
- a pension scheme, a pension fund or a similar scheme which pays pensions to employees, where contributions are deducted from wages and the rules of the scheme do not allow members to transfer their rights under the scheme;
- financial products or services where suitably defined and limited services are provided to certain types of customers in order to increase access for financial inclusion purposes;

30 This list largely corresponds to the current cases that allow for conducting simplified customer due diligence.
31 This also includes wholly owned subsidiaries of listed companies.

- products where the risk of money laundering and terrorist financing is managed by other factors such as spending limits or transparency of ownership (e.g. certain types of electronic money).

3. Geographical risk factors:

- Member States;
- third countries with effective AML/CFT systems in place;
- third countries which, according to credible sources, have a low level of corruption or other criminal activity;
- third countries which, according to credible sources such as peer reviews, detailed evaluation reports, or published follow-up reports, have anti-money laundering and anti-terrorist financing rules in place that are in line with the revised FATF Recommendations and which effectively implement those rules.

4.7. Enhanced customer due diligence

Institutions should determine whether the performance of enhanced customer due diligence is necessary on the basis of a risk assessment, conducted prior to entering into a business relationship or carrying out an occasional transaction. The monitoring obligation may also mean that a stricter CDD is required, e.g. as a result of a change in the risk profile during the customer relationship. Article 8 of the Wwft refers to Annex III to Article 18 of the 4th Directive for enhanced customer due diligence. The specific guidance of the BFT of 15 July 2014 gives examples of types of customers, types of transactions or countries constituting a potentially higher risk.

It should explicitly be noted that the examples below are not intended to be exhaustive. If a country, type of customer or type of service is mentioned in the list below, this does not necessarily mean that there is an enhanced risk of money laundering or terrorist financing and that an enhanced customer due diligence must be carried out. Depending on the concrete facts and circumstances and the professional judgement of the institution, it may be necessary to assess whether an increased risk exists. In many cases an increased risk will only exist if a combination of concerns with respect to a certain country and/or certain type of customer and/or certain type of services exists.

In order to give institutions practical guidance, an integrated list of examples of risk factors has been opted for:

1. Customer-related risk factors:

Some non-exhaustive points of attention that may help the institution to deal with customer-related risk factors are listed in the below:

- Companies that have been shown in practice to possibly be used as a cover for criminal activities (e.g., car repair shops, pizzerias, snack bars, car body shops, Oriental shops, video rental shops, waste disposal companies, sex industry/massage parlours/hotel room rental);
- Catering enterprises[32];
- Call shops[33];
- Companies trading in drug-related products (grow shops, coffee shops, etc.);

32 https://hetccv.nl/onderwerpen/georganiseerde-criminaliteit-en-ondermijning/verschijningsvormen/witwaspraktijken/.
33 https://hetccv.nl/onderwerpen/georganiseerde-criminaliteit-en-ondermijning/verschijningsvormen/witwaspraktijken/.

- Room mediation agencies and hotels[34];
- Painting and construction companies (in connection with undeclared turnover and/or possible bribes/kickbacks);
- Football agencies[35];
- Customers trading in car tyres, scrap metal, computer parts or mobile phones (in connection with VAT carousel fraud[36]);
- Customers where a lot of cash is available (e.g. antique dealers, casinos, bureaux de change, car dealers, jewellers, boat dealers);
- Customers whose shares are bearer shares;
- Customers who provide incorrect or incomplete information or where there is doubt as to the accuracy or completeness of the information provided;
- Customers with (one-off) complex urgent services without demonstrable reason;
- Customers with assets the origin of which is unclear;
- (New) customers from outside the region without there being an explanation as to why they would become customers;
- Customers with an unclear or changing business address without there being an explanation for this behaviour;
- Customers whose business activities are unclear or who use intermediaries whose role is unclear;
- Customers resident in higher-risk geographical areas (see section 3 below);
- Customers with legal persons or legal arrangements that are vehicles for holding personal assets;
- Customers that are part of an opaque or complex ownership structure or control structure;
- Customers running (online) collection campaigns, partly in view of the destination of the funds.

2. Product, service, transaction or supply channel-related risk factors:

- Opening bank accounts in the name of an accountant or tax adviser with the intention of transferring funds or channelling them to third parties, thereby obscuring the link between the (illegal) origin and the destination of the money;
- Use of company structures[37]: use of 'shell companies' or 'dormant companies': companies whose capital is not fully paid up or whose assets do not actually exist or are hidden, or whose accounts are missing or in which no activities are carried out;
- Use of corporate structures: advising on cash companies[38];

34 https://hetccv.nl/onderwerpen/georganiseerde-criminaliteit-en-ondermijning/verschijningsvormen/witwaspraktijken/.
35 FATF report money laundering through the Football Sector, July 2009, www.fatf-gafi.org.
36 See also the FATF report. Laundering the proceeds of VAT Carousel fraud, 2007, www.fatf-gafi.org.
37 See also the FATF report 'The Misuse of Corporate Vehicles, including Trust and Company Service Providers' published on 13 October 2006 (www.fatf-gafi.org).
38 Cash companies are companies that no longer have any activities and have a high cash or bank balance as a result of the sale of their assets. By creating tax obligations in the company, the material tax liability is eliminated, releasing the reserved liquid assets. See, among others, Amsterdam Court of Appeal ECLI:NL:GHAMS:2007:BB 2447.

- Use of corporate structures: use of 'nominees': the natural person, legal person or beneficiary appointed to act on behalf of another[39];
- Chartered accountant, tax consultant or lawyer who is appointed as a director or holder of a power of attorney for an existing or newly established company;
- Share transactions where the value of the shares is difficult to determine;
- Real estate transactions as described in the FEC report, in particular where one or more red flags listed in the FEC report for accountants and/or tax advisors applies[40];
- Customers using funding from outside the regular financial sector (e.g. (cash) loans (from family) from abroad/underground banking);
- Customers who make frequent use of prepaid cards;
- Products or transactions that promote anonymity, e.g. customers using crypto currencies (such as Bitcoins);
- Domestic or foreign (tax) authorities request further information about the customer or BO;
- Payments received from unknown or unrelated third parties;
- Remote business relationships or remote transactions, without certain safeguards, such as electronic signatures;
- Provision of services with regard to the tax voluntary disclosure scheme;
- Fraud investigations, including forensic accounting and similar work;
- Services where international structures are set up to disguise the beneficial owner;
- Drawing up private loan agreements or promissory notes where the origin of the financing is unclear;
- Services in respect of the assignment or set-off of receivables whose value is difficult to determine;
- Advice on back-to-back loans and loan-back schemes;
- Transfer pricing: advising on transactions between related parties that are not at arm's length, in particular where the value of the counter-performance provided is questionable;
- Merger and acquisition with the buyer making use of different financing structures (e.g., financing comes from different countries and/or different conditions are used).

3. Geographical risk factors:

The FATF assesses several times a year in which countries the risk of abuse in the context of money laundering and terrorist financing is high ('high risk jurisdictions').

See the FATF website (www.fatf-gafi.org) for the current list of countries [41]. Transparency International (www.transparency.org) also gives examples of countries in which there may be a higher risk of corruption.

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[39] See also the FATF report 'The Misuse of Corporate Vehicles, including Trust and Company Service Providers', published on 13 October 2006 (www.fatf-gafi.org), with special reference to page 24.

[40] https://www.fec-partners.nl/media/23/70/811531/29/red_flags_misbruik_vastgoed_actualisering_2010.pdf f.

[41] This concerns (in September 2018) the following countries: North Korea, Ethiopia, Iran, Pakistan, Serbia, Sri Lanka, Syria, Trinidad and Tobago, Tunisia, Yemen.

During investigations into property fraud, the following countries or states were identified as constituting a higher money laundering risk: Andorra, Curaçao, Delaware, Panama, Switzerland, Cayman Islands, Guernsey, Jersey, British Virgin Islands, Anguilla, Liechtenstein, Luxembourg and Hong Kong. Depending on the type of transaction carried out and the customer's further risk profile, there may be an increased risk of money laundering or terrorist financing.

Investigations by the BFT have revealed that Malta, Cyprus and the United Arab Emirates can be classified as high-risk countries. It should be noted that it is not the country that automatically carries a higher risk, but rather the combination of the transactions carried out (real estate transactions and/or international (tax) structures with foreign companies or TCSPs).

With regard to geographical risks, the following can also be considered:
1) countries which are subject to sanctions, embargoes or similar measures adopted, for example, by the European Union or the United Nations. See also the section on the Sanctions Act;
2) countries that provide funding or support for terrorist activities or in the territory of organisations identified as terrorist (e.g. Al-Nusra, Al-Shabaab, IS, Al-Qaeda). Examples of such countries are Iraq, Iran, Yemen, Kuwait, Qatar, Saudi Arabia and Syria.

A new provision is Article 8(3) of the Wwft. An institution shall take reasonable steps to investigate all complex transactions and all unusual patterns of transactions that do not have a clear or economic or legitimate purpose. The entire business relationship should be subject to stricter control. Whether an unusually large transaction has taken place or an unusual transaction pattern exists must be assessed with due reference to the customer profile available to the institution on the basis of the customer due diligence. The information collected in this connection may lead to an institution judging that a transaction does not fit the profile it has of the customer. In that case, there is reason to take more stringent measures and more intensive transaction monitoring and, if necessary, to report an unusual transaction.

4.8. Risk policy and risk management

4.8.1. *Risk policy*

Institutions are obliged to adapt the intensity of customer due diligence measures to the risks of money laundering and terrorist financing in a specific case. This risk-based approach to customer due diligence follows the FATF recommendations and will be further expanded upon in the Wwft with the implementation of the 4th Directive in the Netherlands. Under the 4th Directive, an institution must always determine the risks of a specific case on a customer-by-customer basis, taking into account the risk factors mentioned in section 4.7. The risk profile determines the depth of the customer survey.

If the risks of money laundering or terrorist financing are higher, the intensity of customer due diligence measures should be increased.

The following information may be used by an institution in determining its risk policy:

- Supra National Risk Assessment of 26 June 2017 carried out by the European Commission;

- National Risk Assessment Money Laundering / Terrorist Financing 2017, carried out by the WODC;
- Risk indicators that emerge from the stricter customer screening, as elaborated above in section 4.7.

4.8.2. *Risk management*

Once the risks have been identified, an institution is expected to take measures to control them (risk management). The level of the risk of money laundering or terrorist financing are determined by the likelihood of their taking place, and the impact if they do.

How risk management is shaped is a matter for the institution itself.

For measures that can be taken, reference is made to the FATF RBA approach for auditors and similar institutions[42]. Institutions (even if they are tax advisers or administration firms) can also take the measures described in the professional rules for accountants Standard 240[43]. Proper risk management means that additional measures are taken to manage the identified risks. In line with the monitoring obligation, this requires continuous monitoring and checking whether the measures taken are effective. If the risks are too great and cannot be adequately managed, this may mean that an institution has to divest itself of a customer. Risks are not written in stone and may be subject to change. The institution must keep its risk inventory and risk assessment up to date and submit it to the supervisor as necessary.

4.8.2.1. Practical example

An institution has a customer who has a lot of cash at his disposal and the customer is therefore, on the basis of the institution's risk policy, classified in the (potentially) high risk category. The risk management performed may in that case include the following:

- checking whether the customer himself is obliged to report under the Wwft and has drawn up office procedures for this purpose;
- (further) analysis of the cash records, e.g., checking the physical cash book for any corrections made;
- (further) analysis of the cash/bank suspense account items in the general ledger account. This makes it clear how much money is received in cash or deposited in the bank from the cash administration;
- monitoring possible 'smurfing' behaviour by the institution, i.e. checking whether an institution deliberately sets out to remain below the reporting threshold (both for receipts and deposits);
- taking stock of the amount of the cash balance at a given moment (determining whether the cash balance is present at a given moment).

5. Compliance and audit function

5.1. Contents

An institution can safeguard compliance with legislation and regulations on three levels, also known as the 'three lines of defence'[44].

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[42] www.fatf-gafi.org

[43] Although Standard 240 applies to auditors, Appendix 2 of Standard 240 contains practical examples for use by auditors, tax advisers and administrative firms. [44] http://www.toezicht.dnb.nl/3/50-232017.jsp

The first line of defence is formed by the employees responsible for carrying out the institution's services and the internal control system that these employees apply, for example the procedures that employees follow to establish and verify the identity of (potential) customers.

The second line is the compliance function, which monitors whether the internal procedures, measures and agreements and the legal requirements are being complied with in the daily practice of the institution.

The third line is the audit function, which is responsible for the periodic assessment of the effectiveness of the organisational structure, the procedures and measures integrated into the organisation's business processes and the compliance function.

Banks and other financial undertakings are already required by financial supervisory legislation to set up a compliance and audit function. The same applies to TCSPs, which have been obliged to set up a compliance and audit function regardless of the size of the institution since 1 January 2015 . The idea behind this is that trust and company service providers operate in a money laundering-sensitive sector.

The compliance function is aimed at verifying compliance with the Wwft obligations, including reporting to the FIU-the Netherlands. The audit function monitors whether the compliance function is being performed.

The compliance function must be performed independently and effectively. In principle, this means that the persons involved in the exercise of the compliance function are not involved in the activities they supervise[45]. This segregation of duties is important to promote effective compliance. The audit function can also be performed by an internal auditor.

The institution may also choose to outsource the audit function (in whole or in part); this is not compulsory. Outsourcing can include, for example, having the Cooperating Registered Accountants (SRA) conduct studies or having the Netherlands Institute of Chartered Accountants perform a quality review. Assessments by the Dutch Register of Tax Advisers may be relevant to designated members. The external auditor can also fulfil the role of the audit function.
The audit function must be independent. In principle, this means that the persons involved in the performance of the audit function are not involved in the activities they supervise (i.e. neither involved in compliance nor in the primary process).

5.2. When mandatory?

The introduction of the independent compliance and audit function is made compulsory for Wwft institutions to the extent this is appropriate given the nature and size of the institution Article 2d of the Wwft). According to the history of the law[46] , the supervisors may issue a supporting guideline.

[45] House of Representatives, session year 2017-2018, 34808, no. 3, p. 44. In exceptional cases, the compliance officer himself may also be involved in the execution of the primary activities. If Wwft compliance issues exist with respect to his own customer, he should consult with a deputy compliance officer not personally involved with the file in order to guarantee the independence of the compliance function.
[46] House of Representatives, session year 2017-2018, 34808, no. 6, page 44.

Reasonable application of the law at least requires that a compliance function and an audit function be made mandatory in companies[47] that are required under the Works Councils Act (WOR) to have a Works Council (generally those with a total workforce of 50 employees or more on an annual basis). Institutions are expected to set up the compliance function at least on an annual basis. The intensity of the interpretation of the audit function should be in line with the risk profile of the institution.[48] If there are indications that the compliance function is not functioning properly, this may be a reason to use the audit function more frequently. Institutions that have an audit function for other reasons have the option of incorporating the Wwft obligations in their audits.

In practice, there are partnerships between, for example, auditors and tax advisers and civil-law notaries and lawyers. In such cases, they should be considered jointly for the purpose of assessing whether they meet the standard of 50 employees on an annual basis (in such cases, the establishment of a works council will also be mandatory). In other words, if the joint office of both partners employs more than 50 members of staff, a compliance and audit function will be required. In practice, such offices will often already have a compliance officer or compliance function.

In special circumstances, institutions with fewer than 50 employees may be required to have an audit or compliance function in place in view of the 'nature' of the company. If the risk policy of an institution shows that more than 75% of its customers or transactions have a high risk profile, Article 8 of the Wwft applying, the institution is obliged to set up a compliance function and an audit function. An example is a small tax consultancy that advises object companies in the express trust and company services sector or files tax returns for them.

5.3. Assessment framework for the compliance and audit function

The draft 2018 Trust Offices (Supervision) Decree was recently published for consultation. This draft decree gives further shape to the compliance and audit function.
It can also be used as a tool to comply with the compliance and audit function of the Wwft. It should be noted that this assessment framework is only one example of how to achieve the set objective. It is the institution's responsibility to ensure that the compliance and audit function is independent and effective. The possible Wwft compliance function and Wwft audit function are explained in more detail below.

5.3.1. *Content of the Wwft compliance function24*

At many offices, the Wwft compliance function will be included in the duties of the compliance officer, who is also in charge of supervising compliance with other legal regulations within the institution. The following are among the points to consider when setting up the Wwft compliance function:

- checking office procedures on the Wwft;
- involvement in customer acceptance, in particular in integrity risks of (potential) customers of the institution, such as tax evasion and other forms of tax fraud, circumvention of sanction laws, money laundering or terrorist financing;
- reporting findings to the board of the institution (e.g. number of reports, high-risk files, etc.);

[47] The compliance or audit function will usually be embedded at the central level of the company (at the head office) or aligned with the existing compliance systems that a company has in place.
[48] House of Representatives, session year 2017-2018, 34808, no. 3, page 45.

- active involvement in the Wwft risk policy and risk management;
- an active monitoring role in the provision of services to high-risk customers, including monitoring the timely reporting of unusual transactions;
- maintaining the knowledge on the Wwft of the relevant employees (e.g. by providing internal courses and explaining legislation to employees);
- informing employees about internal standards, office procedures and measures;
- providing advice to employees on whether a transaction should be considered unusual in certain cases. If the decision is made not to report the transaction, the reasons must be recorded in writing and kept up to date;
- ensure the reporting of unusual transactions to the FIU-the Netherlands;
- act as a point of contact for supervisors in case of questions or investigations.

5.3.2. *Content of the Wwft audit function*

The following are among the points to consider when setting up the Wwft audit function:

- assessing the effectiveness of the organisational structure;
- assessing the effectiveness and completeness of the business processes and office procedures;
- assessing the effectiveness of the compliance function, by checking whether the compliance officer has fulfilled his task adequately in individual cases (e.g. checking whether the reports made by the compliance officer are complete and correct and whether the decision not to report certain cases was the correct one);
- reporting findings, including any identified shortcomings or deficiencies in compliance, to the management of the institution.

5.4. Training requirements and authorisations

For the compliance and audit function to be effective, it is important that these functions have sufficient expertise, authority and resources and have access to all necessary information. Of course, the fulfilment of the compliance and audit function depends on the number of customers and/or the number of high-risk transactions.

6. Sanctions Act

As set out in the General Guidance on the Wwft and the Sanctions Act of the Ministry of Finance[49], non-financial enterprises such as accountants, tax advisors and administrative firms must also comply with the Sanctions Act. Institutions are expected to consult the Dutch[50], European[51] and UN sanctions lists[52] where relevant. If the Sanctions Act prohibits the performance of a transaction, the (proposed) unusual transaction concerned must be reported.

[49] See chapter 3 of the General Guidance on the Wwft and the Sanctions Act 2014 (January 2014).
[50] https://www.rijksoverheid.nl/documenten/rapporten/2015/08/27/nationale-terrorismelijst.
[51] https://eeas.europa.eu/headquarters/headquarters-homepage_en/8442/Consolidated%20list%20of%20sanctions
[52] https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list.

7. Examples of unusual transactions

7.1. Case: tax fraud, ECLI:NL:CBB:2018: 233

The Trade and Industry Appeals Tribunal on 29 May 2018 ruled (ECLI:NL:CBB:2018:233) that the reporting obligation applies to the suspicion of tax fraud.

The Accountancy Division[53] had already ruled that the Wwft reporting obligation applies to a suspicion of tax fraud in a previous case. The Accountancy Division inter alia ruled as follows:

"4.5.5 The Accountancy Division sees its opinion that the parties involved did have a suspicion confirmed by the post-it memo referred to by the complainant, the existence of which has not been contested by the parties involved, attached to the letter from J to BV1 of 14 October 2009, written by party 2 to party 1, which states: "Y, how are we going to respond? Report VAT fraud? 2007 + 2008 not yet finished". The Accountancy Division does not concur with the statement by the parties involved made during the hearing that they were speaking in colloquial language and that, following J's letter, they in mutual consultation came to the conclusion that they did not suspect a case of fraud and first wanted to obtain the requested documents. Moreover, it appears from the letter from party 2 to J dated 26 October 2009 that the parties involved were at the time also aware of a tax investigation conducted by the tax authorities into the turnover tax due. This knowledge should all the more have given rise to the suspicion that an unusual transaction had taken place, specifically one relating to VAT fraud. In accordance with the case law of the Supreme Court (cf. Supreme Court 7 October 2008, LJN:BD2774) tax fraud can serve as a basis for the criminal-law concept of 'money laundering' in accordance with Article 420bis of the Dutch Penal Code. A suspicion of tax fraud will therefore give rise to the assumption that a transaction may be related to money laundering."

7.2. Case: catering loans, ECLI: NL: CBB: 2016:305

The BFT carried out a supervisory investigation into a chartered accountant who compiled the annual accounts and kept the financial accounts of a start-up catering business. The administrative records revealed (i) that an amount of more than €350,000 had been withdrawn from the current account, and (ii) that there were unclear loans and related cash flows for which no explanation existed. In addition, the customer had been raided by the Fiscal Intelligence and Investigation Service (FIOD), which had resulted in the discovery of a large amount of cash was found. The accountant was aware of this. It was not until after the BFT's investigation and receipt of the draft report of the BFT that the accountant reported sixteen unusual transactions. The Accountancy Division imposed a reprimand and the accountant lodged an appeal.

The Trade and Industry Appeals Tribunal confirmed the conclusion of the BFT that, considered in relation to each other and in conjunction, one or more unusual transactions had taken place.

In addition, the Trade and Industry Appeals Tribunal inter alia found: "*The accountant in forming his professional opinion in the framework of Article 16(1) of the Wwft must consider the question of whether a transaction has an unusual nature. If the accountant answers this question in the affirmative, he must report the transaction. The fact that the accountant is aware that an unusual transaction is already known to an investigative service does not release him from his obligation to report it. It is not a matter for him to speculate on the objectives of the investigation of the investigative service and on which information this investigation service has at its disposal, let alone on whether and, if so, what information is known to other authorities."*

[53] ECLI:NL:TACAKN:2013:YH0342.

7.3. Case: cash loans, negative cash balance ECLI: NL: RBDHA:2016:11828

A trust and company service provider sees to the record keeping, annual accounts and tax returns of a sole proprietorship. This sole proprietorship was audited by the Tax and Customs Administration. That investigation revealed that the administrative records of the sole proprietorship were inadequate, that sales receipts and invoices were not numbered consecutively, and that the cash balance as recorded by the suspect was an administrative cash balance. It has also emerged that an amount of €491,740 in cash was deposited into the bank account of the sole proprietorship in the period under investigation. Of this amount, €202,920 was entered as an expenditure in the cash book by the suspect (from Cash, to Bank). The origin of the other part, €288,820, was unknown. If all payments to the bank were to be recorded as expenses in the cash book, a negative cash balance would exist.

The audit conducted by the Tax and Customs Administration also showed that, during the period between 14 February 2012 and 2 January 2013, amounts 'lent out' were via bank transfer 'refunded' to the owner of the sole proprietorship by a foundation of which he was the treasurer.

The owner of the sole proprietorship received the following amounts back from the foundation:

14 February 2012	€ 5,237
7 March 2012	€ 4,800
21 June 2012	€ 15,000
19 November 2012	€ 54,400
5 December 2012	€ 4,400
7 December 2012	€ 37,000
2 January 2013	€ 30,000

In the criminal case, the court concluded that the administrative firm qualifies as an institution under the Wwft. The fact that the administrative firm was not an accountant is irrelevant, because the administrative firm conducted similar professional and business activities.

Cash deposits

The court further concluded that the cash deposits, totalling €491,740, deposited into the bank account of the sole proprietorship in the stated period must, in view of the following indicators, be regarded as unusual transactions:

D2: Nature and execution unusual: no cash check takes place

E1: The customer prefers assets that leave no paper trail, such as cash

E3: Payment traffic shows an unusual pattern. The funds at the customer's disposal derive from unclear sources or the sources indicated by the customer are unlikely or insufficiently documented.

J4: The actual presentation of the financial statements does not correspond to the underlying documents. Unauthorised transactions or incorrectly recorded transactions.

J7: There is a negative cash balance.

There was a very large cash flow at the sole proprietorship, the origin of which was not documented and could not be verified. The cash balance was even negative.

Bank repayments

In the opinion of the court, the 'repayments' of the foundation must, in view of the following indicators, be regarded as unusual transactions:

D2: Nature and execution unusual
E3: Payment traffic shows an unusual pattern. The funds at the customer's disposal derive from unclear sources or the sources indicated by the customer are unlikely or insufficiently documented.
J4: The actual presentation of the financial statements does not correspond to the underlying documents. Unauthorised transactions or incorrectly recorded transactions.
J9: There are payments without invoices
J10: Payments are made without a written agreement

The payment of significant amounts without documented title and without any form of documented validation is, according to the court, unusual. The fact that it was a private loan does not detract from the fact that private payments (or repayments) to a business account are unusual.

Furthermore, the unusual nature of these transactions does not detract from the fact that the foundation's books were audited by a chartered accountant, or that the trustee would not have found the repayments to be fraudulent acts in respect of creditors. Under these circumstances, it is still not possible to provide an explanation for the origin of the transactions in question.

With regard to the question whether there was intent on the part of the administrative firm, the Court ruled as follows: "*The regulations of the Wwft are regulatory law. In view of the established case law of the Supreme Court, in which 'neutral' intent is considered sufficient under regulatory law, it is not required that the intent of the accused is also aimed at non-compliance with the legal obligation of the suspect to report unusual transactions to the Disclosure Office. In other words, the accused's claimed lack of knowledge of the regulations does not stand in the way of the proof of the suspect having intentionally failed to report the unusual transactions. Contrary to what has been argued on behalf of the accused, the accused is expected to be aware of the regulations that apply to him. In addition, a company can be expected to have a certain level of expertise in the field in which it operates. Furthermore, a company can contact a professional organisation to become familiar with the content of regulations. In view of the above, the defence argued by counsel with regard to the accused's lack of familiarity with the obligation to report under the Wwft is rejected.*"

The court ultimately imposed a fine of €20,000, of which €10,000 was conditional, with a probationary period of two years.

7.4. Case: terrorist financing

An investigation by the BFT conducted into an administrative firm and data from the company register of the Chamber of Commerce showed that Mr A, among others, is a member of the board of Foundation B. A publication in a national newspaper on 1 December 2016 reports that Mr A is also treasurer and co-founder of the Swiss Association C. A number of persons associated with terrorist financing are also members of the board of Association C.

Mr D, for example, is a member of the board of Association C. Mr D has been on the U.S. Treasury Department's sanctions list since 2017 for raising money for a terrorist organisation. This terrorist organisation is closely linked to Al-Qaeda. Furthermore, Mr E, from Bosnia, is director of Association C. He has been prosecuted in his own country for recruiting jihad fighters.

Finally, Mr F, a Yemeni politician and board member of Association C, has been on the U.S. Treasury Department's sanctions list since 2013. F appears on this list because he is considered an important person within Al-Qaeda on the Arabian Peninsula. He purportedly raised money for terrorist actions carried out by Al-Qaeda.

F is also active as a fund raiser for Association G from Qatar. This is a charitable organisation from the network of Association G and a large and influential Salafist charity organisation.

On the basis of the audit file for the financial year 2015 provided by the administrative firm, the BFT found that Foundation B in 2015 received four donations from Association G from Qatar, to a total amount of €267,000.

General Ledger Account Donations Abroad 2015	
Donation 20 January	€ 125,000
Donation 27 January	€ 130,000
Donation 14 July	€ 4,500
Donation 8 December	€ 7,500
Total donations	€ 267,000

No explanation for these transactions was found in the file.

According to the BFT, there is a higher risk of money laundering and terrorist financing because Foundation B has links with suspected terrorist financiers through Association C and Association G. Foundation B received considerable donations in a short period of time from the said Qatari organisation. These donations can be regarded as unusual transactions on the basis of the subjective indicator *"A transaction where the institution has reason to believe that it may be linked to money laundering or terrorist financing"*

BFT, Utrecht, 24 October 2018