

POSITION PAPER

Ultimate Beneficial Ownership

KEY MESSAGES

The NVB is supportive of the European Commission's overarching objective to enhance the effectiveness of the current EU AML/CTF framework. Risk-based ultimate beneficial owner (UBO) investigations and reliable and accessible UBO-information are paramount to an effective client due diligence process. Effective UBO investigations, however, require a lot of effort and manpower on the side of obliged entities. Therefore, it is absolutely key to ensure that the concept of UBO stays meaningful and that CDD requirements on UBO investigations remain risk-based. To assist obliged entities, the UBO-registers must be designed in such a way that they can effectively contribute to combat financial economic crime. Obligated entities must have access to all information in the UBO registers and when assessing low and medium risk clients they should be able to use information from the UBO-register into their own defined risk based approach.

The NVB proposes the following amendments to the proposed EU AML legislation:

- Keep the UBO qualification meaningful and risk-based: maintain the indication for the ownership interest 25% held directly or indirectly in the customer, and remove the reference "on every level of ownership"
- Continue to allow obliged entities to take '*reasonable measures*' to verify the identity of UBOs using a risk-based approach and only prescribe the retention of data points that are necessary
- Provide clarity on the application of UBO determination rules in case of (larger) ownership and control structures
- Enhance the functionality, quality, accessibility and reliability of UBO registers by strengthening the role of the responsible authorities in the Member States

1. Keep the UBO qualification meaningful and risk-based: maintain the indication for the ownership interest of 25% held directly or indirectly in the customer, and remove the reference "on every level of ownership"

The proposed AMLR builds on the concept of UBO as we know from the Financial Action Task Force (FATF) Recommendations and the current EU framework. A private individual's qualification as beneficial owner can be based on ownership, voting rights or factual control. In the current framework ownership is established when an UBO has an ownership interest of 25% plus one of the shares. The rate of 25% plus one strikes the right balance between transparency and the ability for obliged entities to mitigate money laundering and terrorism financing risks. Lowering the 25% plus one criterium rule-based would significantly increase the number of natural persons qualifying as UBO without contributing to mitigating money laundering and terrorism financing risks.

Article 42 of the proposed AMLR stipulates that control through ownership interest (25% plus one of the shares or voting rights or other ownership interest in the customer) should be assessed on "every level of ownership". According to the preamble this should apply to 'every link in the ownership structure and that every link in the ownership structure and the combination of them should be

properly examined'. The scope of potential persons to be considered as UBO by obliged entities will be extended significantly in comparison to the AMLD4, whilst it does not effectively contribute to mitigating money laundering and terrorism financing risks. The consequence of the proposal will be that many more UBO-investigations have to take place, including the identification and verification of these natural persons. This would significantly reduce the value of the concept of UBO as efforts would need to be put in UBO investigations on individuals with a very small diluted interest in the customer instead of on the UBOs that actually have a larger ownership interest. The focus should be on individuals who actually have true decisive influence on the customer via ownership interest, voting rights, or who have factual control. For in-depth examples please refer to annex I at the bottom of this paper.

The NVB strongly recommends to not go below the threshold of more than 25% for control through ownership interest (incl. voting rights) and proposes to remove the reference “on every level” in Article 42 of the AMLR.

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Article 42 Identification of Beneficial Owners for corporate and other legal entities

1. In case of corporate entities, the beneficial owner(s) as defined in Article 2(22) shall be the natural person(s) who control(s), directly or indirectly, the corporate entity, either through an ownership interest or through control via other means.

For the purpose of this Article, ‘control through an ownership interest’ shall mean an ownership of 25% plus one of the shares or voting rights or other ownership interest in the corporate entity, ~~including through bearer shareholdings, on every level of ownership.~~

2. Continue to allow obliged entities to take ‘reasonable measures’ to verify the identity of UBOs using a risk-based approach and only prescribe the retention of data points that are necessary

The AMLR proposal requires obliged entities to verify the identity of beneficial owners, by means of identity documents, passport or equivalent information from reliable sources regardless of the level of risk involved. This approach deviates from the Financial Action Taskforce Recommendations which explicitly state that obliged entities should take ‘reasonable measures to verify the identity’ until the obliged entity is satisfied that it knows who the beneficial owner is. This allows obliged entities to apply a risk-based approach and to focus efforts and manpower to higher-risk situations where verification of UBOs adds value to the CDD-process. The current AML proposal lacks this flexibility especially with regard to low and medium-risk customers and is too rule-based.

The NVB proposes to insert ‘reasonable measures’ in Articles 16, 18 and 19 of the AMLR proposal in line with the FATF standards.

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Article 16 Customer due diligence measures

1. For the purpose of conducting customer due diligence, obliged entities shall apply all of the following measures:

[...]

(b) identify the beneficial owner(s) pursuant to Articles 42 and 43 and take reasonable measures using a risk-based approach to verify their identity so that the obliged entity is satisfied that it knows who the beneficial owner is and that it understands the ownership and control structure of the customer.

Article 18 Identification and verification of the customer’s identity

[...]

4. Obligated entities shall obtain the information, documents and data necessary for the verification of the customer ~~and beneficial owner~~ identity through either of the following:

(a) the submission of the identity document, passport or equivalent and the acquisition of information from reliable and independent sources, whether accessed directly or provided by the customer;

(b) the use of electronic identification means and relevant trust services as set out in Regulation (EU) 910/2014.

[insert new paragraph 5]

5. Obligated entities shall take reasonable measures for the verification of the beneficial owner identity so that the obliged entity is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts, companies, foundations and similar legal arrangements.

Article 19 Timing of the verification of the customer and beneficial owner identity

1. Verification of the identity of the customer and, where done using a risk-based approach, of the beneficial owner shall take place before the establishment of a business relationship or the carrying out of an occasional transaction. Such obligation shall not apply to situations of lower risk under Section 3 of this Chapter, provided that the lower risk justifies postponement of such verification.

2. By way of derogation from paragraph 1, verification of the identity of the customer and, where done using a risk-based approach, of the beneficial owner may be completed during the establishment of a business relationship if necessary so as not to interrupt the normal conduct of business and where there is little risk of money laundering or terrorist financing. In such situations, those procedures shall be completed as soon as practicable after initial contact.

The NVB welcomes the legal basis for obliged entities to obtain nationality or nationalities from its customers as part of CDD. However, in light of the sensitivity of the information it is important to consider the proportionality of obtaining this information from UBOs by default. The NVB believes that it goes too far to always require this information for UBOs, especially where there is no (potential) presence of geographical risk or other red flags and would therefore suggest a risk-based approach.

The NVB proposes to amend Article 44 of the AMLR.

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Article 44 Beneficial ownership information

1. For the purpose of this Regulation, beneficial ownership information shall be adequate, accurate, and current and include the following:

(a) the first name and surname, full place and date of birth, residential address, and country of residence ~~and nationality or nationalities~~ of the beneficial owner. Nationality or nationalities of the beneficial owner may be obtained on a risk-based approach and where obtained, it shall be part of the beneficial ownership information. Where used to verify the beneficial owner's identity, beneficial information shall also include the national identification number and source of it, such as passport or national identity document, or where relevant the tax identification number or other equivalent number assigned to the person by his or her country of usual residence

3. Provide clarity on the application of UBO determination rules in case of larger ownership and control structures with different entity types

The AMLR will continue the practice of having two different sets of rules to determine UBOs for different legal forms. One set of rules is applicable to corporate and other legal entities and one set of rules is applicable to express trusts and similar legal entities or arrangements.

It is unclear however in which circumstance which rules to apply: UBO rules matching the legal form of the customer or rules matching the top of the entity structure. This is especially challenging for banks operating on a cross-border basis, or where the ownership and control structure has an international dimension.

Currently, we observe different approaches between Member States due to lack of clarity on which UBO rules to apply. To ensure a harmonised approach within the Union, the NVB welcomes a clear stipulation of the applicable UBO determination rules in case of different types of legal entities or arrangements in one ownership and control structure. Please refer to Annex II at the bottom of this paper for an example.

The NVB proposes to insert a new Article 43a after article 43 in the AMLR proposal.

Article 43a application of beneficial owner rules

Obligated entities shall identify beneficial owners according to the beneficial ownership rules applicable to their customer. If the customer is a corporate entity or other legal entity, obliged entities shall apply the rules laid down in paragraphs 1 and 3 of Article 42. If the customer is an express trust, or a similar legal entity or arrangements, obliged entities shall apply Article 43 of this Regulation.

4. Enhance the quality, functionality, accessibility and reliability of UBO registers by strengthening the role of the responsible authorities in the Member States

Beneficial ownership registers may prove effective tools to fight money laundering and terrorist financing for governments and obliged entities if they are accurate and well-administered. Due to the lack of commitment in many Member States, the current registers have increased the administrative workload for obliged entities and have not yet succeeded in providing an effective tool to assist obliged entities in their client due diligence efforts. Before the registers are interlinked, as the AMLD6 proposes, Member States should increase the quality of available information, provide basic functionalities and improve accessibility of the registers. The AMLD6 proposal should be amended to ensure Member States are committed to improving the registers on these points.

A) enhance the quality of information

To increase the quality of available information, the responsible authorities (the registrars) should have a stronger role and should be made responsible to, independently, collect and verify the necessary beneficial ownership information. If (legal) entities fail to accurately report their beneficial owners, the authorities responsible should have sufficient legal powers and staff to impose sanctions. Moreover the authorities responsible should, pro-actively, seek to keep the information in the registers accurate, adequate and up-to-date. While obliged entities play a role here as well by reporting discrepancies, it is disproportionate to fully rely on obliged entities to verify the accuracy of information reported by their customers.

To ensure that the authorities responsible for maintaining the UBO registers have the necessary powers, the NVB proposes to amend Article 10 of the AMLD6 proposal as follows:

(underlined text is inserted, strikethrough is deleted)

Article 10 Beneficial ownership registers

[...]

8. In the case of corporate and other legal entities, Member States shall ensure that the entity in charge of the central beneficial ownership register is ~~empowered~~ required to collect and independently verify the beneficial ownership information, carry out checks, including on-site investigations at the premises or registered office of the legal entity, in order to establish the current beneficial ownership of the entity and to verify that the information submitted to the central register is kept accurate, adequate and up-to-date. The right of the central register to verify such information shall not be restricted, obstructed or precluded in any manner.

9. Member States shall ensure that the entity in charge of the central register is ~~empowered~~ required and adequately equipped to impose effective, proportionate and dissuasive measures or sanctions for failures to provide the register with accurate, adequate and up-to-date information about their beneficial ownership.

B) Enhance the functionality

A stronger role for the authorities responsible should also mean that the registers improve in terms of functionality and provide the same kind of functionalities across the Union. For instance, many of the registers in Member States lack the necessary IT-functionality to optimize the searchability, to make available machine readable data and to send updates of UBO-changes to obliged entities.

To ensure that the functionality of the registers is improved the NVB proposes to amend Article 15 of the AMLD6 proposal as follows:

(underlined text is inserted, strikethrough is deleted)

Article 15 Implementing acts for the interconnection of registers

1. Where necessary, the Commission is empowered to adopt, by means of implementing acts, technical specifications and procedures necessary to provide for the interconnection of Member States' central registers in accordance with Article 10(11) with regard to:

[...]

(c) the technical details on how the information on beneficial owners is to be made available, including the use of machine readable formats;

(d) the technical conditions of availability of services provided by the system of interconnection of registers, including search functions and automated update functions;

C) Enhance accessibility and reliance

Obliged entities (at least credit institutions) should be allowed to have full access to the registers (similar to public authorities), free of charge and available in the English language, and should be able to rely on the data made available in the registers using a risk based approach: in case simplified and standard due diligence measures are applied. The reporting of discrepancies by obliged entities should be conducted in a risk based manner and therefore limited to cases where enhanced due diligence is required. Lastly, it should be clear that the registers in the Member States should be consulted in cross-border cases.

The NVB proposes the following amendment to Article 11 of the AMLD6 proposal to provide full access for obliged entities.

(underlined text is inserted)

Article 11 General rules regarding access to beneficial ownership registers by competent authorities, self-regulatory bodies and obliged entities

[...]

2. Access to the central registers referred to in Article 10 shall be granted to FIUs, supervisory authorities, obliged entities, public authorities with designated responsibilities for combating money laundering or terrorist financing, as well as tax authorities and authorities that have the function of investigating or prosecuting money laundering, its predicate offences and terrorist financing, tracing and seizing or freezing and confiscating criminal assets. Self-regulatory bodies shall be granted access to the registers when performing supervisory functions.

3. Member States shall ensure that, when taking customer due diligence measures in accordance with Chapter III of Regulation [please insert reference – proposal for Anti-Money Laundering Regulation], obliged entities have timely and unrestricted access, free of charge and available in the English language, ~~access~~ to the information held in the interconnected central registers referred to in Article 10.

The NVB also proposes amending Article 18 of the AMLR proposal (in conjunction of the comment made in paragraph 2 of this paper) to allow obliged entities to rely on the registers in low and medium risk situations.

(underlined text is inserted, strikethrough is deleted)

Article 18 Identification and verification of the customer's identity

[...]

4.

[insert new paragraph 6]

6. Obligated entities may rely on the beneficial ownership information made available in the registers set up pursuant to Article 10 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final] for the verification of the beneficial owners when applying customer due diligence pursuant article 15 of this regulation and simplified customer due diligence pursuant article 27 of this regulation.

In addition, the NVB proposes to make the reporting of discrepancies by obliged entities more risk based by amending Article 10 of the AMLD6 proposal.

(underlined text is inserted, strikethrough is deleted)

Article 10 Beneficial ownership registers

[...]

5. Member States shall require that the beneficial ownership information held in the central registers is adequate, accurate ~~and~~ up-to-date, and is made available in English. For that purpose, Member State shall apply at least the following requirements:

(a) obliged entities shall report to the entity in charge of the central registers any material* discrepancies they find between the beneficial ownership information available in the central registers and the beneficial ownership information available to them pursuant to Article 18 of Regulation [please insert reference – proposal for Anti-Money Laundering Regulation].

*An example of material discrepancy is for instance when different natural persons are identified as being the actual UBO or when the nature of the interest is different from what is registered.

Lastly, the NVB proposes to clarify the consultation of register in cross-border situations by amending Article 18 of the AMLR.

Article 18 Identification and verification of the customer's identity

4. [...]

For the purposes of verifying the information on the beneficial owner(s), obliged entities shall also consult the central registers referred to in Article 10 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final] irrespective of the Member State of the central register in which the beneficial ownership information is held as well as additional information. [...]

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(Annexes on the next pages)

Annex I: Examples of differences in UBO qualification between AMLR and the current AMLD.

Example 1 – additional UBOs

Current situation in NL

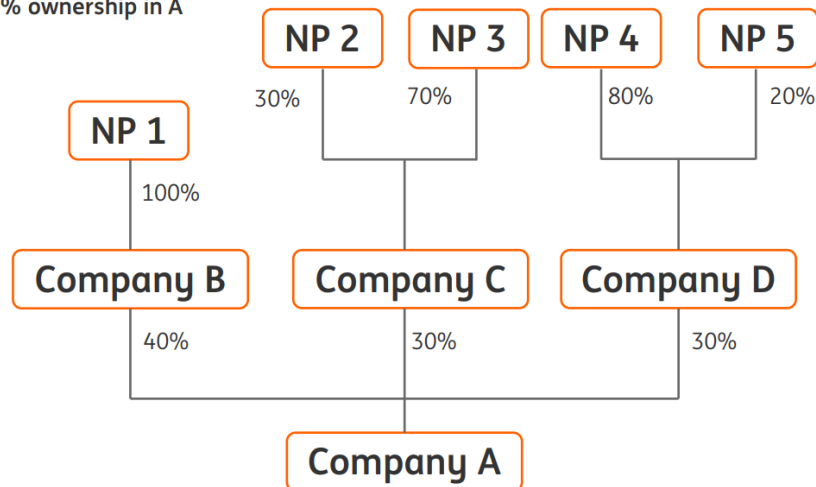
NP1 40% ownership in A
 NP2 9% ownership in A
 NP3 21% ownership in A
 NP4 24% ownership in A
 NP5 6% ownership in A
 → Only NP1 is UBO, >25% ownership in A

Interpretation AMLR

UBOs: NP1, NP2, NP3, NP4
 → All own >25% at each level

Change

→ 4 UBOs instead of 1



Example 2 – different UBOs than the current AMLD4/5 interpretation

Current situation in NL

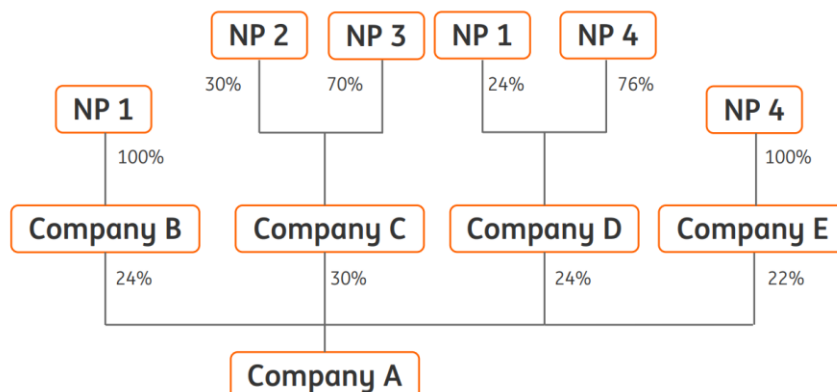
NP1 30% ownership in A (24% via B, 6% through D)
 NP2 = 9% ownership in A
 NP3 = 21% ownership in A
 NP4 = 40% ownership in A (18% via D, 22% through E)
 → NP1 and NP4 are UBOs, both >25% ownership in A

Interpretation AMLR

NP2 and NP3 are UBOs
 → Both own >25% at each level

Change

Totally different UBOs: NP2 and NP3
 → NP1 and NP4 no UBO because they do not own >25% at each level
 → However, NP1 and NP4 have largest interest in A, based on diluted approach



Example 3 – Pseudo UBO (when no ownership interest of 25% plus one can be found)

Current situation in NL

Based on ownership interest, no NPs have >25% ownership

→ **Thus no UBOs**

The UBOs should be appointed pursuant to article 3(1)(a)(2)

Implementation Decree Wwft 2018

→ **Appoint senior management members of customer as UBO**

Interpretation AMLR

Since company D is not meeting the >25% threshold, all shareholders of company D are not considered UBO

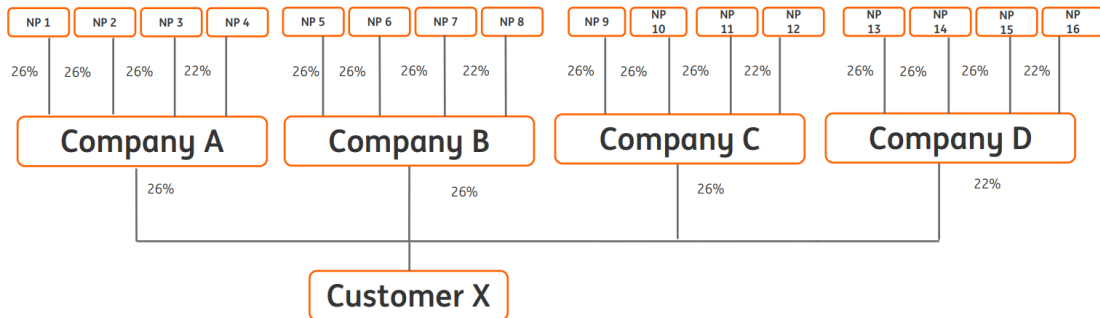
→ **NP1, NP2, NP3, NP5, NP6, NP7, NP9, NP10 and NP11 hold >25% at each level and are therefore UBO**

Change

→ AMLR interpretation results in an inaccurate, inadequate, and diluted UBO definition

→ Mentioned NPs should not qualify as UBO for customer X as they hold 6,8% ownership interest

→ This percentage can even be lower, depending on the structure



Annex II: Importance of clarity of the applicable UBO rules

Current situation in NL

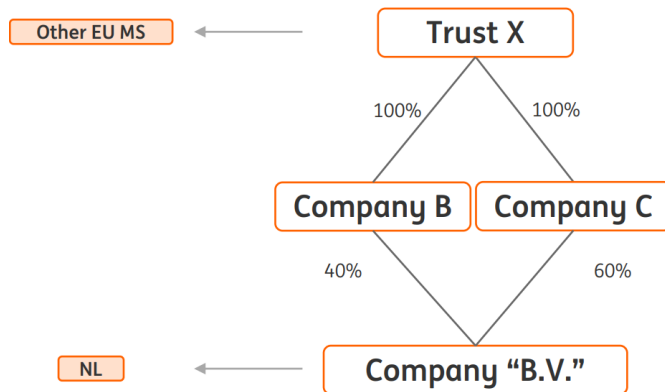
Apply UBO rules for the customer
→ UBO rules applicable to corporate entity ("B.V.")

Current situation in some other EU MS (e.g. BE)

Apply UBO rules of legal entity at the top of the ownership and control structure
→ UBO rules applicable to top entity ("Trust")

Outcome

Different UBOs based on differences in applicable national laws and regulations
→ NL: shares or ownership interest, or voting rights >25%, or factual control. If no person can be identified: pseudo-UBO
→ Some other EU MS: settlor(s), trustee(s), protector(s) if any, all beneficiaries, any other natural person exercising ultimate control over the trust



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