



Ensuring the effectiveness of the UBO-register by making it publicly available with fewer access restrictions

Recommendations regarding the public accessibility of the UBO-register

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1. Introduction

On 25 June 2015, the EU Fourth Anti-Money Laundering Directive (Directive (EU) 2015/849) was enacted, which replaces the previous Third Directive. The Directive imposes an obligation on Member States to establish a UBO-register. UBO stands for ultimate beneficial owner. The purpose of the register is to combat financial and economic crime, such as money laundering and terrorist financing, by creating transparency about who are the ultimate stakeholders of a company.¹ These are the natural persons who, whether or not behind the scenes, ultimately own or control a legal entity and benefit from it. Some of the personal details of UBOs, such as their names and economic interests in the company, will be made public via the register.

Member States have some freedom of choice regarding the establishment of the UBO-register. In this paper we argue that a register, which is publicly available to anyone without registration and free of charge, and which is searchable by name of the UBO, is the best way to achieve the aim of Directive (EU) 2015/849.

The Dutch government, by contrast, has chosen for a register that will only be accessible to the public after registration as a user and against payment of a fee. The UBO-register in the Netherlands will enter into force in early 2020. The register in which the UBO information is included will become part of the National Trade Register (*Kamer van Koophandel* register), and will therefore be administered by the Dutch Chamber of Commerce.

Next to the Fourth Anti-Money Laundering Directive there is also the new European Directive on open data and the re-use of public sector information (Directive (EU) 2019/1024). This new PSI-directive, which must be implemented by all Member States on 17 July 2021,² introduces so-called “high value datasets”. If public sector information qualifies as a ‘high value dataset’, it must be made accessible free of charge, in machine readable format, via API and as bulk download.³ The directive states that information about “companies and company ownership” also constitutes a ‘high value dataset’. As of yet it is unclear whether UBO-information would also fall within this category, but if so, the PSI-directive will create new obligations regarding the UBO-register (for instance, the obligation to abandon the paywall).

2. Beneficial ownership

Any natural person(s) who ultimately owns or controls a company, foundation or association (a so-called legal entity) and benefits from it⁴ must be registered in the UBO-register. The concept of beneficial ownership exists because the direct legal owner of a company is not necessarily the person who ultimately controls and benefits from the assets.

Legal entities are obliged to establish the identity of their UBOs. The qualification as a UBO depends on the holding of ultimate ownership or ultimate control of a client, through the holding of shares, voting rights, ownership interest or other means. Directive (EU) 2015/849 stipulates that it concerns direct or indirect ownership or ownership interests of more than

¹ Art. 1(1) Directive (EU) 2015/849.

² Art. 17(1) Directive (EU) 2019/1024.

³ Art. 13(1) in conjunction with Annex 1 of Directive (EU) 2019/1024.

⁴ Art. 3(6) Directive (EU) 2015/849.

25%. In the Netherlands, article 3 of the *'Uitvoeringsbesluit Wwft 2018'* contains a detailed specification of which persons are to be regarded as UBOs for different legal entities.⁵

- For B.V.'s and N.V.'s a UBO is the natural person who is directly or indirectly entitled to more than 25 % of the economic rights to the company or the person who exercises control. Listed companies are exempted from this 25 % rule.
- For foundations and associations a UBO is the natural person who directly or indirectly has an ownership interest of more than 25 %, who has more than 25 % of the voting rights in the event of an amendment of the articles of association or who has the actual control over the legal entity.
- For a V.O.F., partnership C.V. and shipping company, a UBO is the natural person who directly or indirectly has an ownership interest of more than 25 % or who has more than 25 % of the voting rights in the event of acts of management and/or amendments of the cooperation agreement.

If it is impossible to establish the UBO on the basis of these rules, the person belonging to the senior management may be listed as a UBO. This ensures that a UBO can be registered for every legal person. Registering a UBO from the senior management is only allowed (i) after having exhausted all possible means to determine the UBO and provided that there are no grounds for suspicion, or (ii) if there is doubt as to whether the person who on the basis of the above rules qualifies as UBO is indeed the ultimate owner or has ultimate control.⁶

3. The information contained in the UBO-register

The UBO-register aims to tackle crime such as financing terrorism, money laundering, tax evasion and corruption by preventing people from hiding assets and income that is ill-gotten or on which they owe tax. To combat these crimes, it must be clear from the register who the UBO is. Directive (EU) 2015/849 stipulates what information of UBOs must become accessible to the public: this concerns at least the name, the month and year of birth, the nationality and country of residence of the UBO and the nature and extent of the beneficial interest held.⁷

In the Netherlands, the following information relating to the UBO shall be registered:

- name;
- date, place and country of birth;
- nationality;
- full address and country of residence;
- nature and extent of personal interest held (ranges);
- citizen service number or foreign tax identification number;
- copies of one or more documents confirming the identity of the UBO;
- copies of one or more documents showing the nature and extent of the economic interest held (i.e. why that person is classified as UBO).⁸

⁵ AFM, Wat is een UBO?, <https://www.afm.nl/nl-nl/professionals/veelgestelde-vragen/wwft-algemeen/ubo>.

⁶ AFM, Wat als de UBO niet valt te achterhalen?, <https://www.afm.nl/nl-nl/professionals/veelgestelde-vragen/wwft-algemeen/ubo-niet-te-achterhalen>.

⁷ Art. 30(5) Directive (EU) 2015/849.

⁸ *Kamerstukken II 2018-2019*, 35 179, nr. 3, §2.2.3 & §3.1.5.

However, only a part of the above information can be accessed by anyone in the Netherlands. The authorities, by contrast, can access all the information. This is known as ‘layered access’. A system of ‘layered access’ is also applied in relation to the UBO register in other countries, including the United Kingdom and Denmark.

4. The establishment of the UBO-register

Directive (EU) 2015/849 contains options regarding the establishment of the UBO-register, which can be implemented by Member States, but are not mandatory. Member states have freedom of choice as regards⁹:

- the registration of users of the register;
- the establishment of a paywall;
- the choice of what information is accessible to whom (‘layered access’);
- the possibility to provide for a ground for exception not to disclose information on the grounds of serious safety risks to the UBO (‘shielding regime in case of exceptional circumstances’); and
- the possibility to search the register by name of the UBO or only by the name of the legal entity.

In this regard, the table below shows the different choices made by the Netherlands, the United Kingdom and Denmark.

	<i>The Netherlands</i>	<i>United Kingdom</i>	<i>Denmark</i>
<i>Absence paywall</i>	X	✓	✓
<i>Access without registration</i>	X	✓	✓
<i>Search by name</i>	X	✓	✓
<i>Shielding regime in case of exceptional circumstances</i>	✓	✓	✓
<i>Layered access</i>	✓	✓	✓
<i>UBO-information available via ...</i>	Kamer van Koophandel (Chamber of Commerce)	Companies House	Danish Business Authority

⁹ Minister of Finance of the Netherlands, Letter to Parliament about the contours of the UBO-register, 10 February 2016, <https://www.rijksoverheid.nl/documenten/kamerstukken/2016/02/10/kamerbrief-over-de-contouren-van-het-ubo-register>.

The above table shows that different Member States make different choices as regards the establishment of the UBO-register. In the following sections, we will discuss the underlying arguments behind these choices in more detail. We will do so by contrasting the UBO-register in the Netherlands (par. 5) with the UBO-register in the United Kingdom (par. 6).

5. Arguments for making the UBO-register publicly available with access restrictions

Some Member States have opted to establish the UBO-register as a register that is not publicly available to anyone without registration, not free of charge and not searchable by name of the UBO. The Netherlands is an example of such a Member State.

The Netherlands applies a system of ‘layered access’ when it comes to the accessibility of information in the UBO-register. The following table shows which information is accessible in the Netherlands for the competent authorities and which for the general public:¹⁰

Information accessible for the competent authorities Information accessible for everybody

Name	Name
<u>Date, place and country of birth</u>	Month and year of birth
Nationality	Nationality
<u>Full address</u> and country of residence	Country of residence
Nature and extent of personal interest held (ranges)	Nature and extent of personal interest held (ranges)
<u>Citizen service number or foreign tax identification number (TIN)</u>	---
<u>Copies of one or more documents confirming the identity of the UBO</u>	---
<u>Copies of one or more documents showing the nature and extent of the interest held (i.e. why that person is classified as UBO)</u>	---

Different arguments are entertained to restrict public access to UBO-information. The main argument is that broad access to UBO-information may seriously violate the privacy of UBOs. The fear is that making the register freely and openly available to anyone will enable criminals to search the register for wealthy people in order to do them harm. Applying safeguards, such as registration and a paywall, is meant to help protect the privacy of UBOs.

The idea behind the obligation for users to register themselves is that this will discourage malicious persons to abuse the register, as it will make it easier to trace and identify them. A similar argument applies to the choice to place the register behind a paywall. Here, the idea is

¹⁰ *Kamerstukken II 2018-2019, 35 179, nr. 3, §3.1.5.*

that a paywall will protect the privacy of UBOs, because it raises the threshold to use the register.¹¹ As observed below, practice in the UK indeed shows that even small paywalls can make a huge difference in public accessibility of UBO-information. Opponents believe that by removing the paywall, the privacy of UBOs is at stake, because there are no measures taken that protect that information. Payment also functions as an extra identifier.¹² Through payment the personal data of the user will be registered. This enables the authorities to find out who requested the information in case of abuse of the register. This of course does not mean that this will lead them to the perpetrator, because it is unlikely that people with bad intentions will use their own bank accounts (or other means that will identify them) for payment.

Other reasons for having a paywall are more of a practical nature. As the establishment of the UBO-register costs money, it makes sense to make the register only available in exchange for a fee to cover expenses.¹³ Furthermore, we suspect that the choice to have a paywall and to block the possibility of searching the register by name is informed by the decision to establish the UBO-register at the Dutch Chamber of Commerce. There, the UBO-register will become part of the Company register. As the latter is only accessible after making a payment and is not searchable by name, it is easier to leave these arrangements in place. Otherwise, a new infrastructure would have to be created specifically for the UBO-register.

In our view, the possibility of removing access restrictions to the UBO-register would have to be seriously considered. In this way, a better balance of interests could take place, one where the objective of the register is better ensured. Privacy concerns must not be used as a cover to implement Directive (EU) 2015/849 in the way that requires the least amount of effort. Moreover, as the following section on the UBO-register in the United Kingdom shows, privacy concerns and fears can already be addressed by applying a shielding regime.

6. Arguments for making the UBO-register publicly available with fewer access restrictions

The purpose of the UBO-register is that it should serve as an effective tool to counter money-laundering, tax-evasion and the financing of terrorism. In this section, arguments will be discussed for establishing the UBO-register as a register that is publicly available to anyone without registration and free of charge, and which is searchable by name of the UBO. Such a regime, which is meant to ensure the effectiveness of the UBO-register exists, for instance, in the United Kingdom and Denmark. Due to the fact that there is already a lot of hard data about the UBO-register in the United Kingdom, we will use this country as an example.

¹¹ NIBE-SVV blog, 'Invoering UBO-register moet misbruik financieel stelsel tegengaan', 11 May 2017, <https://www.nibesvv.nl/NIBESVV-blog/Invoering-UBO-register-moet-misbruik-financieel-stelsel-tegengaan.html>.

¹² *Kamerstukken II* 2019-2020, 35 179, nr. 6, p. 2.

¹³ *Kamerstukken II* 2005-2006, 30 656, nr. 3.

Akin to the Netherlands, the United Kingdom provides ‘layered access’ to the information in the UBO-register. The information accessible in the United Kingdom for the competent authorities and for the general public is shown schematically in the table below:¹⁴

<i>Information accessible for the competent authorities</i>	<i>Information accessible for everybody</i>
Name	Name
<u>Date of Birth</u>	Month and year of birth
Nationality	Nationality
<u>Usual residential address</u> , service address and country of residence	Service address and country of residence
The date the person became a UBO of the company	The date the person became a UBO of the company
Nature and extent of the beneficial interest held (ranges)	Nature and extent of the beneficial interest held (ranges)
Whether an application has been made for the individual's information to be protected from public disclosure	Whether an application has been made for the individual's information to be protected from public disclosure

In the United Kingdom, the UBO-register is publicly available to anyone, freely and without a registration duty, and is searchable by the name of the UBO. The reasons why the United Kingdom opted for such regime are (1) that it will contribute to the reliability of the registered information; (2) that it will contribute to the connectivity of different datasets; (3) that it meets with the great demand for UBO-information to have no paywall; and (4) that privacy concerns are already taken away by the possibility of shielding information in exceptional circumstances. These four arguments will be discussed more extensively below.

Reliability of data

The United Kingdom believes that an open register will lead to more relevant, accurate and reliable data, because more people have access to data and can therefore check it.¹⁵ Public or social watchdogs and obliged entities, such as financial institutions, can for example help monitor the provided information, so as to minimize the risk of registering false information.¹⁶ While there is as yet no empirical evidence that supports this idea of “the more eyes, the better data”, the authorities maintaining the register are often understaffed to verify the

¹⁴ Companies House, Guidance for people with significant control, §4.2.1, accessible via: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/753028/170623_NON-STAT_Guidance_for_PSCs_4MLD.pdf.

¹⁵ Global Witness Blog, ‘10 Lessons From the UK’s Public Register of the Real Owners of Companies’, 23 Oct 2017, <https://www.globalwitness.org/en-gb/blog/10-lessons-uks-public-register-real-owners-companies/>.

¹⁶ Transparency Int’l, ‘Taking a step back: Why do we care so much about public registers of beneficial ownership?’, 9 May 2018, <https://voices.transparency.org/taking-a-step-back-why-do-we-care-so-much-about-public-registers-of-beneficial-ownership-263f212f8362>.

provided information.¹⁷ This concern has also been expressed, for example, with regard to the Dutch Chamber of Commerce that will administer the UBO-register in the Netherlands.¹⁸

Connectivity of datasets

Another benefit of an open register is that it allows credit reference agencies to link beneficial ownership data to other information they hold on individuals and companies. This in turn should enable name-based searching of wider databases, with the possibility to further lists of legal and beneficial corporate interests and more links to associated information.¹⁹ Without access to the open register in detail, these agencies cannot construct the wider databases or make wider links, despite the fact that they are important parties in the detection of fraudulent practices.²⁰

Paywall

Practical experience with the UBO-register in the United Kingdom demonstrates that even a small paywall can make a huge difference in accessibility. In the United Kingdom the number of search requests increased from 6 million in 2014/2015 to 1.3 billion requests in 2015/2016 after the paywall was removed.²¹ In 2016/2017 this increased to 2.1 billion requests.²² This shows the great demand for UBO-information. Implementing the UBO-register with a paywall will negatively affect the accessibility of this information. The idea that the establishment of a paywall is necessary to protect the privacy of UBOs (the so-called ‘privacy by paywall’) also seems to be an empty argument, because anyone can still access the data after payment of a fee. Therefore, implementing a paywall doesn’t really offer a privacy safeguard.

Shielding regime

In order to protect the privacy of UBOs in case of serious risk for violence, kidnapping, harm, etc. it is possible to invoke an exception ground to shield the UBO-information. This way the information won’t be accessible except for the authorities. To qualify for this shielding regime, the risk must be significant and serious and must be demonstrated by the applicant.

The United Kingdom considers that this safeguard will sufficiently resolve the privacy concerns of UBOs. This is confirmed by the fact that since the publication of the register in the UK, only a limited number of requests have been made to make use of this exception. According to the most recent numbers available, from more than one million companies that provided beneficial ownership information, only 270 individuals applied to have their information

¹⁷ Id.

¹⁸ See, for example, CM Web, ‘Dit is er mis met het ubo-register’, 2 May 2019: https://cmweb.nl/2019/05/dit-is-wat-er-mis-is-met-het-ubo-register/?vakmedianet-approve-cookies=1&_ga=2.259857354.1198867426.1576767653-1103077201.1576767653.

¹⁹ In the UK, connectivity of datasets is considered to be in accordance with the GDPR. See: Open Ownership, ‘Data Protection and Privacy in Beneficial Ownership Disclosure’, May 2019, <https://www.openownership.org/uploads/oo-data-protection-and-privacy.pdf>, p. 15.

²⁰ HM Treasury/DTI, ‘Regulatory Impact Analysis: Disclosure of Beneficial Ownership of Unlisted Companies’, July 2002, https://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/media/9/9/ownership_long.pdf.

²¹ Global Witness Blog, ‘10 Lessons From the UL’s Public Register of the Real Owners of Companies’, 23 Oct 2017, <https://www.globalwitness.org/en-gb/blog/10-lessons-uks-public-register-real-owners-companies/>.

²² Companies House, ‘Annual Report and Accounts 2016/17’, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/633763/CompaniesHouse_AnnualReport_2017_web_version.pdf, p. 7.

shielded on the basis that it would put them at risk. Only 5 of these requests were granted.²³ This suggests that in the United Kingdom, the argument that UBOs may be in danger if the UBO-information is more openly available to the public, is not considered to be a legitimate concern. Therefore, the least Member States can do is properly investigate if making the UBO-information public raises actual danger. If not, then ‘danger’ should not be used, or only be used with reluctance, as a justification to take measures that restrict public access to the UBO-register.

7. Conclusion

Member States have freedom of choice regarding the establishment of the UBO-register, more specifically whether or not to make the register publicly available to anyone without registration and free of charge. This paper has shown that different choices have been made by different Member States.

We argue that to achieve the purpose of the EU Fourth Anti-Money Laundering Directive, which is to combat financial and economic crime by creating transparency about the UBOs of a company, it is more effective to establish the UBO-register without access restrictions, such as a paywall and registration duty, and with a possibility to search the register by name of the UBOs. This is also the viewpoint adopted by the United Kingdom and Denmark.

The main argument against such an open register, namely that the privacy of UBOs is at stake, does not convince. At least, this argument may not be used to obscure that the real reason for maintaining access restrictions is to find the easiest way to implement the Directive. More substantially, the privacy of UBOs will not be threatened if the UBO-register has fewer access restrictions. If UBOs are in serious danger, they can simply have their information removed. In this context we suggest that the Member States investigate properly if this concern, the fear of being in danger because of the public availability of UBO-information, is legitimate.

Moreover, even by placing the register behind a paywall, the privacy of UBOs will not be fully guaranteed. ‘Privacy by paywall’ is an empty argument because the information will still be accessible after making a (small) payment. By contrast, eliminating such access restrictions will probably increase the efficiency of the register, as more people can access the information and check the data for accuracy and reliability. Once the register is open it will also be possible to link similar datasets with each other and detect irregularities, which serves the purpose of the Directive.

In light of the above, we argue that in order to achieve the aim of Directive (EU) 2015/849, the Member States should seriously consider to establish the UBO-register:

- without the obligation to make a payment in order to use the register;
- without the requirement to register as a user of the register; and
- with the possibility to search the register by the names of UBOs.

²³ Open Ownership / Global Witness, “Learning lessons from the UK’s public beneficial ownership register”, October 2017, p. 5, available at: <https://www.globalwitness.org/en/blog/10-lessons-uks-public-register-real-owners-companies/>.