



Guidelines for the interpretation of the **Money Laundering and Terrorist Financing Prevention Act (Wwft)**

for

tax advisors and accountants

For members of the NIVRA and the NOVAA these Guidelines apply as Guideline 15

This translation is not authorised by the professional organizations



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Status of the guidelines

These Wwft Guidelines for tax advisors and accountants referred to in the Wwft as “external chartered accountants, external accounting consultants or tax advisors” were drawn up in consultation between representatives of the Netherlands Association of Tax Advisors (NOB), the Netherlands Federation of Tax Advisors (NFB), the Council of Tax Advisors (CB), the Royal Netherlands Institute for Chartered Accountants (NIVRA) and the Netherlands Association of Accounting Consultants (NOvAA), hereinafter jointly referred to as “the professional organizations,” as well as some of the large offices affiliated to the professional organizations.

The guidelines are based on a reasonable and practice-oriented explanation of the text of the Wwft and the decisions and ministerial regulations based on this, parliamentary history, the Third European Directive and the Guidance for Accountants in Practice on Implementing a Risk-Based Approach to the FATF.¹ Where the regulations are not clear, this explanation aims for an interpretation which does justice as far as possible to the aim and spirit of the regulations and can be applied in practice in the Dutch context.

The Ministry of Finance and the Financial Supervision Office (BFT) have been informed about these guidelines. Insofar as any comments have been received from these bodies they have been taken into account in the text as far as possible. Where there are differing perspectives, this has been explicitly indicated. Obviously the Wwft Guidelines cannot be binding and do not absolve the institutions either from their own responsibility with regard to the correct application of the regulations. Therefore the professional organizations do not accept any liability with regard to these guidelines being followed and always advise consulting the text of the act. For the viewpoint of the BFT, reference is made to the BFT website: www.bureauaft.nl²

For members of the NIVRA and the NOvAA, these guidelines have the status of guiding principles which are aimed at providing the accountant with support with regard to a specific aspect of the accountant’s profession. Although a careful process of consultation and consideration preceded the creation of the guidelines, professional tax advisors and accountants are not obliged to follow the points of view contained in them. For members of the NIVRA and the NOvAA, this publication does not have the status of professional regulations or instructions.

A few specific aspects of the Wwft are not yet sufficiently clear to accountants. For example, this applies with regard to the scope of the act, also see paragraph

¹ Financial Action Task Force, an intergovernmental organization concerned with the development of national and international policy to combat money laundering and terrorist financing.

² The BFT endorses the efforts which professional organizations undertake to explain the Wwft by drawing up Guidelines. The BFT was prepared to comment on the draft Guidelines, but points out that it should not be assumed that these comments are complete or that the view currently being presented might not change. The Act has primacy. The BFT is not liable for any actions or omissions arising from the application of the Guidelines.

2.3. There will be further consultation with the Ministry of Finance and the BFT on these points. As soon as this consultation has resulted in sufficient clarity, these guidelines will be supplemented further.

1. Introduction

1.1 Background

In 1991 the First European Money Laundering Directive (91/308/EEC) introduced the duty for financial institutions to identify customers and disclose unusual transactions. In the Netherlands this Directive led to the Identification (Provision of Services) Act (WID) and the Disclosure of Unusual Transactions (Financial Services) Act (MOT Act).

The Second European Money Laundering Directive (2001/97/EC) extended the scope of the money laundering legislation, and these obligations also applied for professional persons, such as lawyers, civil-law notaries, tax advisors, external chartered accountants, external accounting consultants and other legal or business advisors. In the Netherlands the Second European Money Laundering Directive, implemented by the WID and the MOT Act (which previously applied for financial institutions), was declared applicable for the above-mentioned professionals by the governmental decree of 24 February 2003.

The Third European Money Laundering Directive (2005/60/EC) in particular concerns extending and clarifying the procedures related to verifying the identity and background of (legal) persons for whom services are provided. This Directive and the Implementing Directive no. 2006/60/EC were implemented in the Netherlands with the amendment of the WID and the MOT Act. The two acts were simultaneously amalgamated in the Money Laundering and Terrorist Financing Prevention Act (hereinafter the Wwft), which entered into force on 1 August 2008.

1.2 Risk-based approach and open norms

While the First and Second European Money Laundering Directives and their implementations still had a rule-based nature, the Third Money Laundering Directive (2005/60/EC) and the Dutch Wwft use a risk-based approach and are “principle-based” (working with open norms). Customer due diligence is the key element, and depending on the risk of money laundering and terrorist financing, this can be performed in a simplified, standard or enhanced way. The Wwft indicates what the customer due diligence should achieve, and in principle leaves it up to the institutions to determine how they achieve this.

A risk-based and principle-based approach enables an institution to comply with this legislation in a way which corresponds as closely as possible to that institution’s own practice. The professional organizations (and other interested institutions) are aware that in practice open norms could give rise to discussion,

but prefer this to the rule-based approach, which is felt to be constricting. Furthermore, the professional organizations consider that it is much more efficient for institutions to think carefully about the risks that customers could be involved in money laundering or terrorist financing than that they should check whether they have the required documents in their dossier on the basis of formal rules. Where the text of the Wwft is not clear, or does not provide an adequate solution for a specific case, it is advisable for an institution to act as far as possible in correspondence with the aim and spirit of the act.

1.3 Why have guidelines?

After the implementation of the Second Money Laundering Directive, the professional organizations found that in practice there were a number of problem areas with regard to the application of the WID and the MOT Act. After all, these had originally been written for financial institutions. Their members felt a need for guidelines for the application of the legislation concerned in practice. Therefore the professional organizations jointly drew up the guidelines for the application of the WID and the MOT Act. These guidelines have been revised a number of times during the course of time.

With regard to the Wwft, the professional organizations are aware that for smaller institutions in particular it may be difficult to develop a risk-based and principle-based policy independently. The professional organizations therefore took the initiative to again draw up guidelines for the application of the Wwft and will also draw up a template for a risk-based policy which can serve as the basis for the policy of offices affiliated to them.

These guidelines for use in practice will be adapted to new insights where necessary. For this reason consult the websites of the professional organizations for the last available version and other relevant documents.

2. General

2.1 Customer due diligence and the duty to disclose

The Wwft is based on two principles: customer due diligence and the duty to disclose. The Act obliges the disclosure of an unusual transaction which has been carried out or proposed, to a disclosures office which has been established for that purpose.³ This duty to disclose is dealt with in chapter 4. The other principle concerns customer due diligence. Institutions which fall under the Wwft must perform risk-based customer due diligence in order to prevent money laundering and terrorist financing. Chapter 3 deals with this customer due diligence.

³ Financial Intelligence Unit Nederland (FIU-NL).

2.2 Who is the Wwft aimed at?

The Wwft imposes the obligation to perform customer due diligence and the duty to disclose on the “institution”. The legal term “institution” comprises 17 categories of service providers, financial institutions, traders, and independent professionals, and any institutions to be designated by governmental decree.

In the context of these guidelines the following categories in particular are important:

- external chartered accountant, external accounting consultant or tax advisor, insofar as they act in the course of their professional activities, or a natural person, legal person or company, insofar as they perform comparable activities in another independent professional or business capacity;⁴
- natural person, legal person or company providing advice or assistance as a lawyer, civil-law notary or junior civil-law notary or in the course of a similar legal profession or business in an independent professional or business capacity with regard to:
 - a. the purchase or sale of immovable property;
 - b. the management of money, securities, coins, banknotes, precious metals, precious stones or other assets
 - c. the incorporation or management of companies, legal persons or similar bodies, as referred to in section 2, paragraph 1, subsection b of the State Taxes Act;
 - d. the purchase or sale or acquisition of undertakings;
 - e. activities in the field of taxation that are comparable with the activities of tax advisors.⁵
- natural person, legal person or company acting as a lawyer, civil-law notary or junior civil-law notary or in the course of a similar legal profession in the name and at the expense of a customer in any kind of financial transaction or property transaction;⁶

In this definition the professional activities (see below, 2.3) have a central place, e.g., giving tax advice. The fact that the professional activities have central place entails that the act also applies when tax advice is given by a professional other than a tax advisor. An accountant, civil-law notary, lawyer or other type of legal professional who gives tax advice in a professional or business capacity must also observe the regulations of the Wwft when giving this advice.

The text of the Act and legal history shows that the intention is that when a professional works in an organization the obligations arising from the Wwft apply to that organization. Hence the term “institution”. This means that the obligation to perform customer due diligence and the duty to disclose – and therefore also the sanction for omitting to observe these obligations – are

⁴ Section 1, paragraph 1, subsection a, sub 11° Wwft.

⁵ Section 1, paragraph 1, subsection a, sub 12° Wwft

⁶ Section 1, paragraph 1, subsection a, sub 13° Wwft

obligations at the level of the organization/institution. It is up to the organization/institution to ensure that its partners and employees comply with the Wwft. If the organization/institution does not do this or does not do it well, the organization/institution is responsible. It also seems logical that controlling the observance of the Wwft should happen at the level of the organization/institution. In the case that there is a group of legal persons affiliated to each other (holding with operating companies), the Act appears to provide room to place the responsibility either at the level of the operating company or at the level of the holding. The above is without prejudice to the situation that when the institution fails to observe the Wwft, the individual partner or employee can be held responsible as an accessory or fellow perpetrator of this offence.

In principle, customer due diligence can be performed by anyone employed in the institution.

With regard to the duty to disclose, professional organizations recommend implementing a clear “line of disclosure” in every office for the disclosure of unusual transactions. In practice, the disclosure is generally carried out internally first by the professional to a central employee appointed for this purpose, e.g., the risk manager or compliance officer of the institution. He deals with the disclosures and draws up the internal disclosure directives. The responsibility of the individual professional is based on the internal directives of the institution. The institution is responsible for ensuring that its employees implement the regulations correctly and that unusual transactions are disclosed to FIU-NL promptly and correctly. The legislator established an explicit training obligation for this purpose (see 2.5).

2.3 Activities for which the Wwft applies

The obligation to perform customer due diligence and the duty to disclose apply insofar as the professional activities of the external chartered accountant, external accounting consultant or tax advisor are carried out. The following activities should always be considered:⁷

- work relating to the annual accounts;
- the keeping of records;
- tax advice;
- completing tax returns (for simple returns, see below, paragraph 2.4.4);
- new types of services such as “tax assurance”.

For the sake of clarity, this must concern “professional activities” where there is a risk of money laundering or terrorist financing. For example, organising a seminar for a customer is not covered.⁸ The precise scope of the Act as regards the professional activities of the accountant is not yet clear and forms the subject of discussion between this professional group and the legislator/supervisor.

⁷ Lower House, no. 31 238, no. 3, pp. 11-12.

⁸ Lower House, no. 31 238, no. 3, p. 12.

2.4 Activities for which the Wwft does not apply

2.4.1 General

On the basis of Section 1, paragraph 2 Wwft, the Wwft does not apply to tax advisors and lawyers, civil law notaries and other legal professionals, insofar as they perform activities for the customer regarding the determination of his legal position, representation and defence before the courts, the provision of advice before, during and after legal proceedings, or the provision of advice about instituting or avoiding legal proceedings.

The legislator clearly assumes that accountants do not institute fiscal proceedings. The professional organizations state that the exception for tax advisors should also apply to accountants in fiscal proceedings and are arguing for an amendment of the law.⁹

2.4.2 Orienting discussion and determining the customer's legal position

Every potential customer relationship starts with an orienting discussion in which the professional concerned gets to know the customer and determines what service is required. If necessary, the professional will carry out some further investigation to determine whether the required service can be provided. For example, an accountant will want to see the potential customer's accounts. A professional may decide not to accept the customer or not to provide the required service.

The professional organizations consider that an exploratory discussion does not fall under the scope of the Wwft.¹⁰ The result is that if the professional should be given indications of possible (proposed) unusual transactions during the exploratory discussion and the professional decides not to provide the required service (for example, on the basis of his professional rules or the institution's code of conduct) there is no duty to disclose, because no business relationship has been established, and there is no customer. If a professional goes on to provide a service after or during the intake discussion (an example could be giving advice), there is a duty to disclose an unusual transaction which came to light during the intake discussion, unless there is a risk of legal proceedings (see below, paragraph 2.4.3). This also applies for a proposed unusual transaction which came to light during the intake discussion. For the meaning of "proposed", see paragraph 4.5

⁹ Also see paragraph 2.4.3 below on the derived right not to give evidence. An accountant who assists a lawyer or tax advisor in this situation makes use of the right of the lawyer or the tax advisor not to give evidence.

¹⁰ Also see the passage from the Explanatory Memorandum cited below.

Therefore determining the customer's legal position is preceded by an exploratory discussion.

Determining the customer's legal position entails an analysis of his legal position. The Wwft does not apply to these activities carried out by the tax advisor, so that everyone has access to adequate legal assistance.¹¹ In this case there is a customer relationship, and therefore the tax advisor can present the customer with a bill for these activities.

The Explanatory Memorandum¹² contains the following statement in the explanation with Section 1, paragraph 2 about determining the legal position:

"The phrase "determination of a customer's legal position" must be interpreted as follows, even though this is a restrictive interpretation: –the opportunity must be provided to determine which services are required from a (junior) civil-law notary, lawyer, or tax advisor. Lawyers and tax advisors need to know in order to determine whether or not the service they are required to perform is being requested in connection with legal proceedings. Civil law notaries need to carry out an initial check to ascertain whether the service requested is the most appropriate one for the customer in this particular case.

In order to adequately determine which service is involved, an exploratory meeting with the customer will be required in any case, which meeting is always strictly confidential. This ensures that every customer can freely submit all information that is relevant to the assessment as to whether legal assistance is being requested in connection with legal proceedings, and whether services are required that are covered by the scope of this Bill. This initial meeting will be sufficient for gaining insight into the customer's motives. To the extent that it becomes clear afterwards that the required activities are activities referred to in Section 1, paragraph 1, subsection a, sub 11°, 12° and 13°, that are not related to legal proceedings, these activities will classify as a service governed by the rules of this Bill. In that case the lawyer, (junior) civil-law notary or tax advisor will have to suspend the actual provision of services until he can identify his customer, in accordance with the provisions of Chapter 2."

The use of the term "exploratory discussion" in this Explanatory Memorandum is confusing, because as indicated above, an exploratory discussion precedes the determination of the customer's legal position.

2.4.3 Activities with a view to (possible) legal proceedings

An exception also applies for tax advisors¹³ with regard to the obligation to perform customer due diligence and the duty to disclose, insofar as these concern activities related to:¹⁴

¹¹ Section 1, paragraph 2 Wwft. For the position of accountants in this, see paragraph 2.4.1.

¹² Lower House, 2007-2008, no. 31 238, no. 3, pp. 15-16.

¹³ For the position of accountants in this respect, see paragraph 2.4.1.

¹⁴ Section 1, paragraph 2 Wwft.

1. the representation and the defence of the customer before the courts;
2. the provision of advice before, during and after legal proceedings;
3. the provision of advice about instituting or avoiding legal proceedings.

The exemptions described above under 1 and 2 do not require any further explanation. The exemption under 3 logically includes advice which is related to the legal proceedings in such a way that customer due diligence and/or disclosure would undermine the exemptions under 1 and 2.

In the view of the professional organizations, procedures for filing a notice of objection also fall under the scope of the term “legal proceedings”. After all, if a customer goes to a professional for advice about instituting legal proceedings, and for representation before the courts, as a result of a decision by the inspector, the professional will necessarily first have to submit an objection to the inspector. In fact, the appeal is already being prepared during the period of objection. If legal assistance for this necessary precursor to the ultimate legal proceedings were not exempt from the obligations of the Wwft, the exemption ex Section 1, paragraph 2 would be a dead letter.

The BFT has indicated that it sees the procedure for filing a notice of objection primarily as an extension of the tax return and therefore considers that this procedure does not fall under the term “legal proceedings”. This view of the BFT is not supported by the history of the Act; in view of its aim and spirit (free access to legal protection), the professional organizations consider that this position is an excessively restricted explanation of the term “legal proceedings”.

For accountants and tax advisors who are commissioned to carry out their activities by a lawyer or civil-law notary, the related right not to give evidence logically entails that, insofar as an exception applies with regard to the duty to disclose for the lawyer or civil-law notary on the basis of section 1, paragraph 2, the exception with regard to the duty to disclose also applies to them for that service.

2.4.4 Simple income tax returns and inheritance tax returns

Institutions are exempt from the obligation to perform customer due diligence with regard to providing assistance with completing simple tax returns for income tax and providing advice related to this.¹⁵ This concerns tax returns for which the taxpayer:

- does not receive taxable profits from a company;
- does not receive taxable results from other activities;
- does not have a significant interest;
- does not benefit from savings and investments.

¹⁵ Section 2, sub a Wwft, Implementing Regulation of 23 July 2008.

The same exemption applies for providing assistance with a tax return in the context of the 1956 Inheritance Tax Act.¹⁶

The exemption for simple income tax returns and inheritance tax returns only applies to the obligation to perform customer due diligence. The duty to disclose continues to apply in full.

2.5 Training obligation

Institutions must ensure that their employees are familiar with the provisions of this Act insofar as relevant to the performance of their duties, and that they are trained to enable them to recognize an unusual transaction (Section 35). This concerns a permanent training obligation, i.e., the knowledge must be refreshed and updated at regular intervals.¹⁷

3 Customer due diligence

3.1 Introduction

Essentially customer due diligence consists of identifying the customer and verifying his identity. The customer due diligence should make it possible to disclose an unusual transaction, including the data of the customer's identity.

Like Section 3 of the Second European Money Laundering Directive on which the WID was based, the WID did not make a clear distinction between identification and the verification of this identity. As a result, identification was in practice often equated with verifying the identity.

The Third European Money Laundering Directive and the Wwft¹⁸ do make a clear distinction between *identification* and *verification* of identity. For example, the term "identification" entails that the service provider obtains the family name, first names, address and date of birth¹⁹ of a customer/natural person, either from the customer himself or from a third person (not prescribed by regulation). The term "verification" means verifying that this name is actually the name of the customer, on the basis of (more or less) objective sources.

Chapter 2 of the Wwft deals with the following aspects, briefly summarized:

- the cases in which there is an identification obligation;
- when verification is required;
- what level of verification is required;
- when identification and verification must be completed;

¹⁶ Section 2, sub b Wwft, Implementing Regulation of 23 July 2008.

¹⁷ The professional organizations NOB, NIVRA and NOVAA plan to offer their members an e-learning module which meets this legal obligation.

¹⁸ Section 1, paragraph 1, sub c and d Wwft.

¹⁹ See Section 33.

- which exceptions apply;
- when identification and verification by other institutions can be used;
- what information can be used for verification.

These rules are described by the Act as “customer due diligence.”

3.2 Obligation to perform customer due diligence

The Act stipulates that an *institution* must carry out *customer* due diligence before the *business relationship* is established or a *transaction* is carried out.²⁰ The Wwft prohibits an institution from entering into a business relationship or carrying out a transaction if it has not performed customer due diligence or if this customer due diligence did not produce the verification of the identity required.²¹ An existing business relationship must be terminated if customer due diligence did not take place or does not produce the required result.²² The terms in italics are defined in Section 1, paragraph 1 of the Act.

3.3 Business relationship and transaction

A business relationship is a business, professional or commercial relationship between an institution and a natural or legal person that is related to the professional activities of that institution and that is assumed will last some time at the moment when the contact is established.²³

The business relationship is distinguished by the expected length of a transaction: operation or combination of operations by or on behalf of a customer in connection with the procurement or provision of services.²⁴

Obviously the Act attaches consequences to the distinction between a business relationship and a transaction, but neither may be established without satisfactory customer due diligence performed by the institution.

The service provided by tax advisors and accountants usually has to be designated as a business relationship, as it is expected to last for some time.

3.4 The customer

The customer is the “natural or legal person with whom a business relationship is established, or on whose behalf a transaction is carried out.”

²⁰ Section 4 Wwft.

²¹ Section 5 Wwft.

²² Section 5 Wwft.

²³ Section 1, subsection g Wwft.

²⁴ Section 1, subsection m Wwft.

In several situations there may be doubts about who the customer is for the purposes of the Wwft, particularly if the task was formally commissioned by (and the invoice sent to) a party other than the party which has a direct substantive interest in the professional's activities.

Examples are:

1. A foreign correspondent asks for activities to be carried out for one of his customers, but wants the invoice to be sent to him.
2. A bank asks for a fiscal input into a transaction it wishes to propose to one of its customers; it asks these questions in order to make the best possible proposal to the customer for a transaction which the bank will carry out for the customer, obviously for payment. The tax advisor does not have any contact with the bank's customer, but only with the bank. At the end of the transaction the bank asks for the invoice to be sent directly to its customer because it has been agreed with the customer that the bank can charge on external costs of advice.
3. A foreign legal person asks for assistance to establish an international structure under a Dutch holding company. When the holding has been established, the advisor is asked to send the bill to the holding company.
4. The foreign head office of a worldwide group asks an accountant's office there to carry out an accountant's audit of all its subsidiary companies. In this context an audit is carried out of the statutory annual account in a Dutch subsidiary company by a Dutch accountant. The report is drawn up in the name of the Dutch subsidiary company, but the invoices for these services go through the foreign accountant's office.

In general, these situations have in common the fact that the formal client is, in the first instance, a party other than the party on whose position advice is provided or for whom the activities are carried out in a substantive sense. It is also easily conceivable that in these situations the party with whom there is a civil law agreement for commissioning the work is a party other than the party with a direct and substantive interest in the services provided.

There is no clear rule which can be distilled from the Wwft to indicate who can be designated as a customer. Therefore this will depend on the facts and circumstances of the specific case. The aim of the Wwft should also be taken into consideration in this respect.

Normally the customer will be the party which acts as the contracting party in civil law, and in whose name invoices are sent.

Therefore in general this will be the client, unless he is clearly acting *on behalf of* another party which has a direct substantive interest in the services provided; in that case the customer is that other party.

In view of the aim and spirit of the Wwft, the test, in the opinion of the professional organizations, will in practice not be whether there is a representative in a formal sense, but whether the institution is *acting on behalf of*

another party in a substantive way. In this assessment the type of service that is provided is also relevant.

In general, a legally prescribed audit of the annual account of a company will only be carried out in a substantive way on behalf of the company being audited. Fiscal proceedings against a tax return imposed on a company are substantively granted on behalf of that company. A fiscal structural advice for an international group is provided for the top holding of that group. A due diligence report for a takeover candidate on behalf of the buyer takes place in a substantive sense on behalf of the buyer, even if the subject of the investigation is the takeover candidate. When the purchase has been concluded and the advisor is asked by the buyer to henceforth promote the fiscal interests of the company that was bought, that company becomes the substantive customer.

For the examples given above, this means that:

1. The foreign correspondent, who is clearly not asking for the advice for himself but for another party, should provide the identity of that other party and that this other party should be designated as the customer for Wwft purposes.
2. The bank should be designated as the customer because it uses the advice for its own commercial interests and is therefore a directly interested party. Therefore the advisor should not agree to invoice a party that is unknown to him.
3. The foreign legal person is the customer for the structural advice. For specific questions related to the new holding, the holding can probably be designated as the customer. If the everyday affairs of the holding are also taken on, there is a business relationship with the holding and the holding becomes the customer.
4. In view of the type of services provided, there is a direct case of services provided to the Dutch subsidiary company, which is therefore the customer for Wwft purposes. The foreign head office of the group and the foreign accountant's office are substantive representatives of the Dutch subsidiary company.

In order to prevent any discussion, it is advisable for the institution to perform customer due diligence for both the formal client and the substantive customer in cases of doubt. As the financial accounting is often followed by a check, it is advisable for the institution to ensure that customer due diligence has been performed for every party in whose name there are invoices in the financial administration or to ensure that there is proof that this party is not the substantive customer, but clearly an intermediary.

3.5 What is entailed by (standard) customer due diligence?

An institution must perform customer due diligence to prevent money laundering and terrorist financing.²⁵ Briefly, the customer due diligence entails the following steps:

- to identify the customer and verify the customer's identity²⁶;
- where applicable, to identify the beneficial owner and take risk-based measures to verify the beneficial owner's identity²⁷;
- to determine the objective and envisaged nature of the business relationship²⁸;
- to carry out constant monitoring of the business relationship and the transactions²⁹

3.5.1 Identification and verification

A customer must be identified, i.e., the data of the customer's identity must be known. Therefore it is not permitted to provide services to anonymous customers. The relevant data must then be verified. This concerns the name and address, for natural persons the family name, first names and date of birth, for legal persons the legal form, the name given in the articles of association, the trade name, the place of business, the country where the registered office is situated, and, if possible, the registration number of the Chamber of Commerce and Industry.

3.5.2 Representative

For the identification of the customer and its verification, it is possible to omit the verification of the representative's identity.

The WID explicitly required the "identification" of the representatives of legal persons.³⁰ This requirement has expressly been omitted in the Wwft³¹ to reduce the administrative work. In addition, the WID provided that a natural person acting on behalf of a customer or a representative of a customer must be identified, and that it is necessary to establish whether the natural person appearing at the institution is acting for himself or for a third party.³² This provision has also lapsed.

²⁵ Section 3, paragraph 1 Wwft.

²⁶ Section 3, paragraph 2, subsection a Wwft.

²⁷ Section 3, paragraph 2, subsection b Wwft.

²⁸ Section 3, paragraph 2, subsection c Wwft.

²⁹ Section 3, paragraph 2, subsection d Wwft.

³⁰ Section 3 WID.

³¹ See Lower House, 2007-2008, no. 31 237 (Implementation proposal), no. 3, p. 8.

³² Section 5 WID.

The Wwft does still require that “the family name, first names and date of birth” are established of the person acting on behalf of a customer or legal person.³³ This means that essentially there is identification, but there is no obligation to verify the identity. Therefore under the Wwft it is no longer necessary to consult and/or make a copy of the representative’s passport, but in addition to asking for the family name it is also necessary to ask for the complete first names and date of birth.

The obligation to record the data of the party acting on behalf of a customer or legal person does not apply if it is sufficient to perform a “simplified customer due diligence.” In that case there is no obligation to perform customer due diligence, but it is sufficient to collect data showing that the customer belongs to a certain category of customers³⁴ (see 3.9).

Obviously it is important to ensure that a party which states that it is giving instructions on behalf of a customer is actually acting on behalf of this customer and is not obtaining services under cover to enable it to engage in money laundering or terrorist financing. This risk increases as the social control decreases and instructions and other communications take place exclusively by telephone, e-mail or fax. If the accountant or tax advisor has discussions or provides services in the office of the company the chance of being misled is obviously significantly smaller.

3.5.3 Ultimate beneficial owner (UBO)

In pursuance of the Third European Money Laundering Directive the Wwft introduces the obligation to establish who are the ultimate beneficial owners (UBOs) of a legal person.³⁵

The definition of a UBO is:

1° a **natural person** who holds a share of more than 25 per cent of the issued capital or can exercise more than 25 per cent of the voting rights in a shareholder’s meeting of a legal person other than a foundation, or can exercise actual control over this legal person, unless this legal person is a company subject to disclosure requirements³⁶ ;

³³ Section 33 Wwft. In the Memorandum of Amendment the requirement to record the document containing a personal identification number on the basis of which the representative’s identity was established has lapsed.

³⁴ Section 6, paragraph 1 Wwft provides in the cases listed there that Section 3, paragraph 1 Wwft and Section 3, paragraph 3 (a, b and d) do not apply. As Section 3, paragraph 1 Wwft (Obligation to perform customer due diligence) does not apply, the condition in Section 33 has not been met (an institution which has identified the customer or business relationship on the basis of this Act and has verified his identity). In place of the customer due diligence, Section 6, paragraph 2 Wwft contains the obligation to gather sufficient data to establish whether Section 6, paragraph 1 Wwft applies.

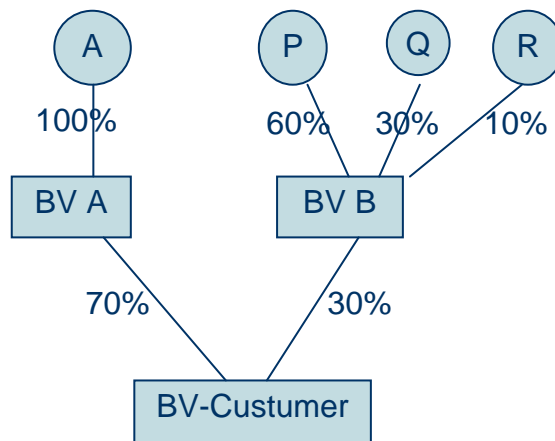
³⁵ Section 3, paragraph 2, subsection b Wwft.

³⁶ As referred to in Directive no. 2004/109 of the European Parliament and the Council of the European Union of 15 December 2004 concerning the transparency requirements which apply for information about issuers whose securities are admitted to trading on a regulated market and

2° the **beneficiary** of 25 per cent or more of the assets of a foundation or a trust, as referred to in the Convention on the Law applicable to Trusts and on their recognition,³⁷ or the party that has special control over 25 per cent or more of the assets of a foundation or trust.

In practice this means that for every customer/legal person, an insight must be obtained in the first instance into the shareholder structure. If it is a top holding listed on the stock exchange in the EU or in a non-EU state where disclosure requirements equivalent to those in the EU apply, it suffices to establish that there can be no UBO in the sense of the Wwft. In other cases further investigation will be necessary.

The definition of a UBO contains the phrase “or can exercise actual control over this legal person”. This could refer to the situation in which a shareholder may not actually have a direct 25%+ interest in the customer, but does have an equivalent control. For example, in the example below, P is a UBO of BV-Customer because he has a decisive influence on the voting behaviour of the 30%- interest of BV B in BV-Customer.



Furthermore, in this case:

- A is a UBO of BV-Customer;
- Q is a UBO of BV B, but not of BV-Customer;
- R is not a UBO of BV B, nor of BV-Customer.

As regards the UBOs of a foundation or trust, the legislator has partly abandoned the Directive. In particular, if there are no named beneficiaries of a trust or foundation, the Directive provides that the category or persons in whose interest the entity was established must be designated as the UBO. (In that case the individual person in this category would not have to be identified.) The legislator (correctly) considers that this would lead to an unworkable criterion and does not impose this requirement.

amending Directive 2001/34/EC (OJ EUL390), or to requirements of an international organization which are equivalent to that Directive.

³⁷ Treaty series 1985, 141.

A foundation with a generic objective and a normal management, with a larger circle of persons with an interest in the foundation's activities, will not have a UBO, according to the interpretation of the professional organizations. It is only if the foundation carries out an activity focusing on a small number of specific persons that there may be a UBO, depending on the facts and circumstances. This could occur in the case of a foundation where the assets have to be used for the welfare of an extremely limited number of persons (4 or fewer), or where such a limited number of persons can instruct the management of the foundation to use the assets in a particular way. An Foundation administrative office which financially leads to a complete passing on of benefits to the certificate holders, in accordance with the fiscal rules, is only carrying out administrative activities and does not have any UBOs. Obviously certificate holders can be UBOs of a company of which the shares have been certified.

3.5.4 Identification and risk-based verification of the UBO

Where there is a UBO, he must be identified and, depending on the institution's risk assessment with regard to money laundering and terrorist financing, the identity must be verified. If the ultimate interest of a client is in mortmain, viz., in the hands of a foundation or trust, the institution must take appropriate measures to gain an insight into the control structure and the possible claims of beneficiaries in relation to the UBO. The risk policy of the institution must indicate how far these measures should go.

In many cases the identification and risk-based verification of the UBO will not be possible without the customer's cooperation. Public registers and business information providers do not provide this information as standard. This means that the customer will have to be asked to publish these UBOs, if and insofar as they exist, and in addition, to cooperate with the verification if necessary.

In this case the most far-reaching verification entails establishing, on the basis of deeds, contracts, registrations in public registers or other objective, reliable sources, that the UBO referred to does actually have a right to more than 25 per cent of the capital interest, the assets of a trust or foundation, or the voting rights.

A less far-reaching verification could entail, for example, that an insight is obtained into the ownership and control structure, but that this insight is not upheld in every respect by supporting documents. It is up to the tax advisor or accountant to determine whether this insight inspires enough confidence against the background of the structure's risk profile.

The verification of the UBO does not necessarily entail a verification on the basis of an identity document. After all, if the institution does not have any personal contact with the UBO, this sort of verification does not provide any added value.

For existing customers, UBO due diligence can be omitted (no retroactive force)³⁸, unless there are grounds to perform the UBO due diligence for existing clients in the context of monitoring the business relationship (see 3.7).

3.5.5 Monitoring the business relationship and the transactions

In pursuance of the Directive, the Act requires constant control of the business relationship and the transactions carried out (insofar as this is possible) to ensure that they correspond to the knowledge which the institution has of the customer and of his risk profile, with an investigation into the source of the assets where appropriate.

For smaller institutions, this constant monitoring of the business relationship can mean that the professional must ask himself with regard to every service requested by the customer whether this service corresponds to the customer's profile, and that changes with regard to the customer's capacity or his circumstances are assessed in terms of the risk of money laundering and terrorist financing. For larger institutions it is possible to consider appointing a central employee in the institution to supervise this, and to ensure that business software supports this employee's supervision (recording data with a date, monitoring changes to data, central checks with the use of the internet, etc.)

The Act prescribes that the business relationship must be terminated if the customer due diligence did not produce the required result³⁹, i.e., the identification and verification of a customer and UBO and determining the relationship⁴⁰ are not possible.

Therefore, in carrying out their activities the tax advisor and the accountant must pay attention to changes in the customer's risk profile. Obviously this concerns changes which lead to an increase in the risk of money laundering and terrorist financing. The training efforts which institutions must undertake⁴¹ must also focus on recognising such changes.

Office organizations of large institutions must be organized in such a way that the tax advisor or accountant who carries out a new project for an existing customer has a certain insight into the customer profile established earlier, so that it is possible to determine whether the new project corresponds to the customer profile.

³⁸ Section 38 Wwft.

³⁹ Section 5, paragraph 1 Wwft.

⁴⁰ Section 3, paragraphs 1 and 2, opening words and subsections a, b and c Wwft.

⁴¹ Section 35 Wwft, see 2.5.

3.6 Wwft risk policy

An institution must gear its customer due diligence to the risk sensitivity to money laundering or terrorist financing, to be assessed on the basis of the following criteria:

- the type of client;
- the type of business relationship, product or transaction;
- the customer's country of origin and company environment.

The institution must record the starting points it uses for this purpose. It will soon be possible to look up an example of this sort of risk policy on the websites of the professional organizations.⁴²

Accountants will be able to base the risk policy on the regulations which apply for them with regard to accepting and continuing with customers and commissions.⁴³ The following aspects should be taken into consideration, supplemented with the characteristics of the institution itself:

- the nature of the task, as well as the extent to which the public interest is involved in this;
- professional risks which are greater than normal, for example, as a result of unusual circumstances at or with regard to the customer, which could result in having to take into account the possibility that the task cannot be carried out according to the rules. Amongst other things, the following aspects could be considered:
 - the integrity of the customer;
 - the sector in which the customer is active (real estate, pleasure craft, the catering industry, etc.);
 - the customer's financial position (and of possible colleagues in the sector);
 - the complexities of the customer's structure;
 - unusual transactions carried out by the customer (see which objects can be involved in unusual transactions under examples for sectors);
 - the institution's experience of the customer;
 - the experience of the institution and its employees with regard to comparable tasks.

The professional organizations for accountants recommend involving "COS 240" in the customer due diligence.⁴⁴

Furthermore, the professional organizations refer to the guidelines drawn up by the FATF for the application of the risk-based approach by specific groups

⁴² For example, see <http://www.nob.net/?q=Wwft>

⁴³ For example, VGC, chapter B1-210; further regulations on the independence of an auditor is public practice, Chapter 2.3; NVAK, Article 4, Article 10, paragraph 1, sub c, Chapter 4, Integrity in business management, for example, Article 53, paragraph 1; NV COS 220, paragraphs 14-18.

⁴⁴ In the annexes to COS 240, see "examples of fraud-risk indicators" and "examples of circumstances" which are a sign of the possibility of fraud".

making disclosures, such as civil-law notaries, lawyers and accountants.⁴⁵ The guidelines for accounts also apply for giving tax advice. Amongst other things, guidelines are formulated to indicate for what type of services, type of transactions and customers there may be an increased risk of money laundering and terrorist financing.

3.7 Cases in which customer due diligence is performed

The institution must perform customer due diligence in the following cases: ⁴⁶

- a) if it enters into a business relationship in or from the Netherlands;
- b) if it conducts an incidental transaction in or from the Netherlands for the customer with a minimum value of € 15,000, or two or more related transactions with a minimum joint value of € 15,000;
- c) if there are indications that the customer is involved in money laundering or terrorist financing;
- d) if it doubts the reliability of information obtained earlier from the customer; or
- e) if the risk of an existing customer's involvement in money laundering or terrorist financing gives cause to do so.

Sub a corresponds to the general requirement of Section 5 Wwft to perform customer due diligence before entering into a business relationship. Sub b is a corresponding provision for incidental transactions. Sub b no longer applies to tax advisors and accountants, as this presumes a payment to or via the institution. This explanation is based on the origin of the provision. Sub c, d, and e were written for existing business relationships and appear to describe how they are monitored in more detail. If there is cause to do so, the identity of the UBO may, for example, subsequently have to be verified on the basis of documents from a reliable and independent source.

If the customer due diligence gives rise to making a disclosure about a proposed unusual transaction during the course of the business relationship, the institution will have to consider whether to terminate the business relationship (if this proves to involve cooperation with money laundering or terrorist financing), or to continue it.

3.8 Moment of identification and verification

The main rule is that the customer due diligence is performed before the service is carried out. ⁴⁷ However, the Wwft does permit the verification of the identity of the customer or of the beneficial owner during the process of establishing the

⁴⁵ RBA Guidance for Accountants, FATF, 17 June 2008. These can be downloaded from www.fatf-gafi.org

⁴⁶ Section 3, paragraph 3 Wwft.

⁴⁷ Section 4, paragraph 1 Wwft.

business relationship.⁴⁸ In this respect there is an important difference with the WID, which did not formally permit this. The term “during the process of establishing” must clearly be interpreted to mean that a start may be made on providing the service. The terminology and the rationale of the regulation presume that the customer due diligence starts at the same time as the start of the activities. The article requires that the verification takes place as soon as possible after the first contact.

The following conditions apply for this concession to the requirement:

- entering into the business relationship immediately is necessary for an uninterrupted provision of services; and
- the risk of money laundering or terrorist financing is low.

For tax advisors and accountants this provision creates room for the acceptance of the customer to take place at the same time as the start of the urgent activities. In this way the Wwft provides a much more natural and practical solution than the WID. It is also in the interests of the institution to conclude the customer due diligence as quickly as possible, as the customer’s enthusiasm for cooperating on customer due diligence is greatest at the start of the service. In the case of urgent telephone instructions from unknown foreign customers, the assessment of the risk of money laundering or terrorist financing must be carried out with greater care.

3.9 Simplified customer due diligence

3.9.1 What is meant by simplified customer due diligence?

The prohibition on entering into or continuing a business relationship (or carrying out a transaction)⁴⁹ does not apply for the cases referred to in Sections 6 and 7, Wwft. It is sufficient to perform simplified customer due diligence in these cases. This entails that it is only necessary to establish whether the customer falls under one of the categories that are mentioned (3.9.2).⁵⁰ This can be established in a relatively simple way, for example, whether the institution is a registered bank or insurance institution, with the aid of the registers on the website of the DNB and AFM. Although it is not compulsory, it is worth considering when the customer is accepted, to record in the administration the moment on what basis it was decided to perform simplified customer due diligence. This could involve a print-out of a relevant register and/or a declaration by the employee of the institution. In fact, this can usually also be reconstructed subsequently.

⁴⁸ Section 4, paragraph 2 Wwft.

⁴⁹ Section 5 in conjunction with Sections 6 and 7 Wwft. Section 6 provides that the prohibitions of Section 3, paragraph 1, paragraph 3, opening words, and subsections a, b and d, paragraph 4 and Section 4, paragraph 1 Wwft on the performance of customer due diligence do not apply either.

⁵⁰ Section 6, paragraph 2 Wwft.

If there are indications of involvement in money laundering or terrorist financing, or if there is a risk of this, customer due diligence must be performed at a later date. Therefore some form of monitoring must be carried out. It is logical that this is primarily carried out anyway by the professionals who are providing a service for the customer. In addition, a compliance officer could conceivably carry out the control.⁵¹

3.9.2 For which categories of customers?

Briefly, the following categories of customers are eligible for simplified customer due diligence:⁵²

- “institutions” in the sense of the Wwft,⁵³ such as banks, life insurers (the exemption for non-life insurers has lapsed), financial institutions having their registered office in the Netherlands or in another Member State;
- the institutions mentioned above outside the EU, with corresponding legal requirements regarding customer due diligence related to money laundering and terrorist financing. The Minister has designated the States which have corresponding legal requirements.⁵⁴
- companies listed on the stock exchange in the EU or in a State outside the EU, insofar as those companies are subject to disclosure requirements in that State equivalent to those of the EU;
- 100% subsidiary companies of the above-mentioned companies listed on the stock exchange;⁵⁵
- Dutch government bodies, and
- under certain conditions, EU bodies.

For everyday practice this means a great improvement in relation to the WID. The identification of companies listed on the stock exchange and government bodies such as Dutch ministries, provinces, municipal councils, etc., proved to come up against a great deal of resistance and problems.

Other categories of customers may also be designated by order in council.⁵⁶

⁵¹ In pursuance of Section 6, paragraph 1 Wwft, Section 3, paragraph 3, subsection c and e continue to apply.

⁵² See Section 6, paragraph 1 Wwft.

⁵³ For the definition of an institution, see Section 1, paragraph 1, subsection a, 1° to 8° Wwft and the cases referred to in Section 6, paragraph 1 Wwft.

⁵⁴ The minister has designated the following states: Argentina, Aruba, Australia, Brazil, Canada, French Polynesia, Guernsey, Hong Kong, Japan, Jersey, the Isle of Man, Mayotte, Mexico, the Netherlands Antilles, New Zealand, the Russian Federation, Singapore, St. Pierre and Miquelon, the United States of America, the Wallis archipelago and Futuna Island, South Africa and Switzerland (Section 3 Wwft Implementing Regulation of 23 July 2008).

⁵⁵ Section 2 of the Wwft Implementing Decision of 15 July 2008. N.b. This section incorrectly refers to Section 3 Wwft. The intention is to refer to Section 6 Wwft. The section will be amended as soon as possible.

⁵⁶ Section 6, paragraph 3 Wwft.

This simplified customer due diligence does not apply for trust offices, tax advisors and accountants as customers.

Section 7 Wwft also permits simplified customer due diligence for a number of specific business relationships. As these are not relevant for accountants and tax advisors, they are not discussed here.

3.10 Enhanced customer due diligence

The Act imposes the obligation to perform enhanced customer due diligence:

- if and insofar as a business relationship or transaction entails a greater risk of money laundering or terrorist financing;
- for identification of natural persons who are not physically present;
- for services to politically exposed persons (PEPs).

3.10.1 Increased risk of money laundering or terrorist financing

If there is an increased risk of money laundering or terrorist financing, supplementary customer due diligence is required.⁵⁷ Business relationships (and transactions) may be designated by order in council, where the Minister presumes that there is a greater risk. On the basis of consultation with the Ministry of Finance, the professional organizations understand that for the time being there is no intention to carry out these designations.

The Act does not indicate what the supplementary customer due diligence should entail, merely that it is supplementary. It is logical that in these types of cases the tax advisor or accountant must obtain greater certainty regarding the correctness of the identity, and a lighter form of certainty is not enough. This could involve a double check or bringing in an office which provides business information. The extent and thoroughness of the additional due diligence can be geared to the assessment of the level of increased risk in this respect.

3.10.2 Identification of a customer who is not physically present

The Wwft provides⁵⁸ that if a customer is not physically present for identification, the institution must take extra measures. Section 8, paragraph 2 focuses on a customer who is a *natural* person, or at least this can be derived from the phrase “if a customer is not physically present for identification”. After all, a legal person is never physically present. The other explanation could be that supplementary due diligence is always necessary for legal persons. This is not very likely, as the identity of legal persons can be verified very easily without their physical presence. The representative of a legal person may be physically

⁵⁷ Section 8, paragraph 1 Wwft.

⁵⁸ Section 8, paragraph 2 Wwft.

present, but the identification/verification of that person has actually been abolished.

The Wwft mentions a number of specific measures that can be taken if the customer is not physically present:

- verifying the customer's identity on the basis of additional documents, data and information, with an assessment of the authenticity of the documents submitted; or
- guaranteeing that the first payment by the customer is made from a bank account in the EU or in a State designated by the Minister.

In the case of verification on the basis of additional documents, data or information, asking for an authenticated copy of the passport is the most obvious solution. Furthermore, it is also possible to make use of an additional declaration by a witness or, for example, energy bills. These documents must then be assessed for their authenticity.

3.10.3 Politically exposed person (PEP)

One important new element is the requirement for the institution to have available risk-based procedures to determine whether a customer is a politically exposed person who is not resident in the Netherlands.⁵⁹ The European Money Laundering Directive uses the term Politically Exposed Person. The abbreviation PEP is also used in these guidelines, because this is the customary international term.

Risk-based procedures for identifying a PEP could be including in the confirmation of the order and/or the general conditions of the institution the provision that a customer/natural person who is not resident in the Netherlands is obliged to give the names of immediate family members and of political positions held by him/her and/or his/her immediate family members. However, this measure would seem to have too general a nature, as the requirement is that the PEP must be identified by means of a risk-based procedure.

The professional organizations consider that the PEP control means that if the institution has any indications or suspicions that this could be a PEP for whom there are also environmental factors indicating an increased risk of money laundering or terrorist financing, such as, for example, the country of origin, it must perform further investigation in this respect.

If an institution suspects that a customer could be a PEP, the institution can check the names concerned against a database of business information providers. However, for the smaller offices which normally do not have many foreign clients, this would appear to be going too far. In this case a simple Google check should be sufficient. If there is absolutely no indication that the person

⁵⁹ The rationale of the regulation and the limited control possibilities of an institution entail that it is necessary to proceed on the assumption of the place of residence known to the institution. After all, an institution can only proceed on the basis of the place of residence shown in the passport and on the basis of the current address.

concerned might be a PEP, the professional organizations consider that an institution does not have to take any further measures.

It is striking that the text of Section 8, paragraph 4 refers only to procedures to determine whether the *customer* is a PEP. Therefore the Act does *not* require a PEP check for representatives or directors of legal persons or for UBOs. This is curious, as it is precisely a PEP acting in bad faith, inter alia, to hide his identity, who can be expected to prefer using legal persons for the purposes of money laundering or terrorist financing. Although there is no legal obligation, it may still be advisable, in view of the aim and spirit of the Act, and depending on the “political” position, the reputation of the party involved, and the required service, to perform an enhanced procedure in the case that it is not the customer but his director, representative or UBO who proves to be a PEP.

A PEP is a person as referred to in the Implementing Directive,⁶⁰ unless he last held the position referred to more than one year previously, as well as his direct family and close associates.

This concerns the following persons:

- a. heads of State, heads of government, ministers and deputy or assistant ministers;
- b. members of parliament;
- c. members of supreme courts, constitutional courts or of other high-level judicial bodies whose decisions are not subject to further appeal;
- d. members of courts of auditors or of the boards of central banks;
- e. ambassadors, chargés d’affaires and high-ranking officers in the armed forces;
- f. members of the administrative, management or supervisory bodies of State-owned enterprises;

Middle-ranking or more junior officials are not classified in the categories sub a) to f). Where applicable, positions at the international level, including the EU level, also come under the categories listed sub a) to e).

The immediate family members are:⁶¹

- the spouse;
- any partner considered by national law as equivalent to the spouse;
- the children and their spouses or partners;
- the parents;

The “close associates” are:⁶²

- a. any natural person who is known to have joint beneficial ownership of legal entities or legal arrangements, or any other close business relations, with a person referred to in paragraph 1;

⁶⁰ See the reference in Section 1, paragraph 1, subsection e Wwft to Section 2, paragraph 1, paragraph 2 and paragraph 3 of the Implementing Directive 2006/70/EC.

⁶¹ Section 2, paragraph 2 Implementing Directive.

⁶² Section 3, paragraph 3 Implementing Directive.

- b. any natural person who has sole beneficial ownership of a legal entity or legal arrangement which is known to have been set up for the benefit de facto of the person referred to in paragraph 1.

The emphasis in the description of close associates is on the phrase “who is known to have”. The Explanatory Memorandum ⁶³ expressly refers to the fact that an institution is not required to conduct an active investigation to discover the presence of a close associate.

The question whether a customer is an immediate family member of, for example, a high-ranking officer in the armed forces obviously does have to be actively investigated. This makes it the most difficult group, as it assumes that it is necessary to check whether the son-in-law of a “foreign” customer has held one of the above-mentioned positions in the previous twelve months. This actually means that the customer is a PEP.

If the customer proves to be a PEP, it is necessary to ensure that ⁶⁴

- a) the decision to enter into the relationship or conduct the transaction is approved by an employee of the institution authorised to do so (in practice, this will be a compliance officer or risk manager; in smaller offices often the office or practice group manager).
- b) the institution takes adequate measures to establish the source of the assets used in the business relationship or transaction;
- c) the institution constantly monitors the business relationship.

The condition sub c was already a general condition ⁶⁵ and therefore does not appear to be an extra requirement. The adequate measures must consist of asking the client to state the origin of the assets, supported by documentation.

3.11 Taking over the identification/verification in the case of a referral ⁶⁶

The prohibition on entering into a business relationship or conducting a transaction does not apply if the customer’s identity has already been verified pursuant to the Wwft, or in an equivalent manner, by an accountant, tax advisor, civil-law notary, lawyer, or other type of legal professional referred to in Section 1, paragraph 1, subsection a, 11°, 12° or 13° Wwft, having its registered office in the EU, or by one of the other institutions mentioned wherever it is registered, with the exception of a Money Transaction Office.

The customer due diligence must have been performed pursuant to the Wwft or in an equivalent manner. The institution where the customer is introduced, and which makes use of the customer due diligence performed by the institution which referred the customer shall satisfy itself of this. This can be done by

⁶³ Lower House, 2007-2008, no. 31 238, no. 3, p. 13, line 26.

⁶⁴ Section 8, paragraph 4 Wwft.

⁶⁵ In pursuance of Section 3, paragraph 2, subsection d Wwft.

⁶⁶ Section 9 Wwft.

requesting the identification/verification data from the institution referring the customer ⁶⁷, and assessing them.

According to the professional organizations, the words “in an equivalent manner” mean that in the case of referrals by professional parties it is sufficient if the professional who referred the customer established his identity in accordance with the applicable legislation in his jurisdiction, if that legislation is aimed at implementing the Third European Money Laundering Directive.⁶⁸ It is recommended that the referring institution confirms this in writing. Obviously it is also possible for a referring party outside the EU to carry out an identification and verification pursuant to the Wwft.

If a customer is introduced by this sort of institution, the institution making the referral is obliged to provide the identification and verification documents at the request of the tax advisor or accountant. In the case of a referral, accountants and tax advisors therefore have to “also submit” the documents upon request, without the customer having to give any further consent for this. As a referral in practice takes place in consultation with the customer, it would seem practical to inform the customer on that occasion about the fact that information and copies of the documents will be provided to the subsequent institution.

If there is no question of an introduction, the tax advisor or accountant can make use of the identification by another institution, but in that case both the customer and the other institution must be prepared to cooperate.

3.12 Outsourcing customer due diligence ⁶⁹

The customer due diligence can be carried out by a third party as regards the identification and verification of the customer, the UBO and the objective and envisaged nature of the business relationship. In itself this is not remarkable, because this was – and is – always possible under the responsibility of the institution. In this respect it does not appear to be obvious for the objective and envisaged nature of the business relationship to be determined by a third party. On the other hand, a business information provider could report changes in the customer’s status, though Section 10, paragraph 1 Wwft does not refer to this aspect of customer due diligence.

Section 10, paragraph 2 Wwft provides that if the outsourcing is of a structural nature, the institution shall lay down the relevant assignment in writing. The addition of the word “structural” means that in an incidental case it is not necessary to lay down the customer due diligence assignment in writing (in contrast with the provision of the BFT in the WID).

⁶⁷ Section 9, paragraph 2 Wwft.

⁶⁸ See Article 15, Third European Money Laundering Directive.

⁶⁹ Section 10 Wwft.

3.13 Information which can be used for verification

The verification is carried out on the basis of documents, data or information from a reliable and independent source.⁷⁰ The WID required an authenticated extract from the Chamber of Commerce and Industry or a document containing the same information drawn up by an independent lawyer. In the Wwft there is no prescribed form and the institution can obtain the information, for example, directly from the Chamber of Commerce and Industry or another reliable and independent business provider without this having to be in the form of an extract (although obviously this is permitted).

Documents can be designated by ministerial regulation on the basis of which this obligation can be met. This possibility is aimed at supporting practice by extending the sources rather than restricting them. By way of example the Explanatory Memorandum gives the possibility for an institution to acquire an extract directly in electronic form. This is permitted under the WID with the proviso that it must be an authenticated electronic copy. According to the text of the Wwft even the form of the extract, whether electronic or in another form, is not necessary and the data can also be obtained from the Chamber of Commerce and Industry or a comparable independent institution.

The explanation for the Implementing Regulation contains the following provision:

“Section 4, paragraph 1 of this regulation summarises some documents which can be used to comply with this requirement. This summary is not exhaustive and the verification can also be carried out on the basis of other documents, data or information from an independent source. This is related to the principle-based approach to the Act: it prescribes the required result of the customer due diligence, but not how the investigation must be carried out. The advantage is that this formulation gives institutions the possibility of taking technological developments into account, enabling them to achieve efficiency gains.

According to this section, the identity of a natural person can be verified, inter alia, by a valid passport. This covers national passports, foreign passports, diplomatic passports and service passports. A valid Dutch identity card is also sufficient as is a valid identity card issued by the competent authority in another member state. The EU identity card must have a passport photograph and the holder's name. The same applies with regard to a driving licence. A valid Dutch driving licence is sufficient; a valid driving licence issued by the competent authority in another member state is also sufficient if the driving licence has a passport photograph and the holder's name. In addition, travel documents are accepted for the verification of the identity of refugees and aliens, as well as aliens' documents issued on the basis of the 2000 Aliens Act.

⁷⁰ Section 11 Wwft.

As indicated earlier, other documents, information or data can also be accepted for the purposes of the verification of the identity of a natural person. The condition is that they originate from an independent source.”

For foreign legal persons not having their registered office in the Netherlands, the description has been modified to some extent, also at the request of the professional organizations, with the aim of corresponding to the available information in a more practical way. Instead of stipulating a reliable and independent source, this now concerns documents, data or information, that are reliable and customary in international commerce. This means that it is possible to use business service providers and it is no longer strictly necessary to use official registers/documents.

The Explanatory Memorandum explains this as follows:⁷¹

“The obligation to identify foreign legal persons caused considerable problems in practice because some countries do not have an official commercial register, while a notarial deed is sometime impossible or very difficult to obtain. To eliminate these problems, a flexible approach was chosen where an institution can base the identification on documents that are customary in international commerce. An institution must be able to demonstrate to the supervisor that it was justified to rely on particular documents. Institutions are perfectly capable of making such decisions, since they, too, will want to ascertain the customer’s identity with a view to covering their business risk. Where applicable, an institution is permitted to rely on the identification and verification by a branch in a third country or an introduction by a local company that is also subject to anti-money laundering provisions and with which it does business on a regular basis.”

This means that it is possible to use data, documents or information which serve as a valid form of verification in the State of origin. (translator’s note: this sentence is not a quotation from the original Dutch text)

The Implementing Regulation lists the following documents on the basis of which the obligation can be met:

- a. an extract from the register of companies;
- b. a deed or declaration drawn up or issued respectively by a civil-law notary with a registered office in the Netherlands or by a civil-law notary or another independent legal professional comparable to a civil-law notary from another member state.

In practice, institutions have considerable problems identifying certain entities which do not have legal personality, such as partnerships and corporations without legal personality. Section 11, paragraph 4 of the Wwft provides that rules may be laid down by ministerial regulation with regard to verifying the identity of other categories of customers.

This was done in the Implementing Regulation as follows. The identity of a customer as referred to in Section 11, paragraph 4 of the Act can be verified on

⁷¹ Lower House 2007-2008, no. 31 238, no. 3, p. 24.

the basis of documents, data or information from a reliable and independent source.

The identity of a religious community which is not a legal person, an independent part of this community or a body to which it is associated, can be verified on the basis of a document which shows that the religious community, the independent part of that community or the body to which it is associated is affiliated to the Interdenominational Contact in Public Affairs, or is designated as an institution within the meaning of Article 6.33, paragraph 1, subsection b of the 2001 Income Tax Act.

The identity of an association of owners in the meaning of Article 112, paragraph 1, subsection e of Book 5 of the Civil Code can be verified on the basis of the articles of association of that association, which form part of the regulations of the deed of division in the meaning of Article 111 of Book 5 of the Civil Code.

Finally, it is noted that an institution does not have to be satisfied with the documents or data referred to in the Implementing Regulation if the institution has any doubts about their reliability.

3.14 Records

The Act contains specific instructions for recording the identity and verification data.⁷² These records must be recorded in an accessible manner, which reasonably entails that they are easy to check. Therefore they can be recorded in the customer's dossier or in a central administration or in a combination of these.

The following data must be recorded regarding a **customer/natural person** and his possible representative:

For the purposes of identification:

1. Family name
2. First names
3. Date of birth
4. Address and place of residence or place of business; or a
5. Copy of the document containing a personal identification number on the basis of which the identification was carried out.

For the purposes of verification:

1. Nature;
 2. Number;
 3. Date;
 4. Place of issue of the document on the basis of which the identity was verified.
- This can be done with the copy referred to sub 5.

The nature of the services to be provided

⁷² Section 33 Wwft.

This is often apparent from the dossier, but can also be indicated centrally and in a more general manner (tax advice, controlling activities, administrative services, etc.).

The following data must be recorded regarding a **customer/legal person** and his possible representative:

Regarding legal persons incorporated under Dutch law

A. Regarding the legal person

1. the legal form;
2. the name given in the articles of association;
3. the trade name (if there is one);
4. address, including house number and postcode;
5. the place of business;
6. the country where the registered office is situated;
7. the registration number with the Chamber of Commerce and Industry and the business address of the Chamber of Commerce and Industry;
8. the manner in which the identity was verified.

B. Regarding the person acting on the legal person's behalf

1. first names;
2. family name;
3. date of birth.

The verification of the representative's identity on the basis of an identity document is no longer required.

C. Nature of the services provided

This is often apparent from the dossier, but can also be indicated more centrally and in a more general manner (tax advice, controlling activities, administrative services, etc.).

Regarding foreign legal persons

A. Regarding the legal person

- the documents on the basis of which the identity was verified.

Admittedly Section 33 refers only to recording the *documents* (with the omission of data or information), on the basis of which the identity of the foreign legal person was verified, but this text is in contradiction with the text of Section 11, paragraph 3 Wwft, in which the verification can take place on the basis of documents, data or information that are reliable and customary in international commerce. The provision with regard to recording cannot logically restrict this provision. Clearly this was ignored in the Memorandum of Amendments. Therefore it seems reasonable to professional organizations to read "documents" as "documents, data or information".

B. Regarding the person acting on the legal person's behalf

1. first names;

2. family name;
3. date of birth.

The verification of the representative's identity on the basis of an identity document is no longer required.

C. Nature of the services provided

This is often apparent from the dossier, but can also be indicated more centrally and in a more general manner (tax advice, controlling activities, administrative services, etc.).

Although it is not a legal obligation, the professional organizations also advise recording the data regarding the UBOs involved.

The data must be retained for five years following the moment when the business relationship was terminated or the transaction was carried out.

3.15 Transitional provision

The requirements regarding customer due diligence of Section 3, paragraph 1 Wwft do not apply to customers who have already been identified/verified under the WID, or for whom there was an exemption under the WID. Similarly the provisions on records for those customers under the WID are also deemed to comply with the requirements regarding records of the Wwft.⁷³

Therefore for existing customers it is not necessary to investigate whether they are PEPs or whether there are UBOs, and who these may be. Although, strictly speaking, the monitoring requirement does not apply for customers already identified pursuant to the WID, the professional organizations consider that it is useful to monitor the risk profile of customers whose identities were verified before 1 August 2008. This monitoring can result in an existing customer subsequently being declared to be high risk, and the institution then carrying out investigations into PEPs and UBOs. However, if there are no special circumstances, the PEP/UBO status of the customer does not have to be updated.

4. Duty to disclose

4.1 General

The duty to disclose prescribed by the Wwft has not essentially changed, compared to the Disclosure of Unusual Transactions (Financial Services) Act.

The legislation stipulates that if an institution has a suspicion that there might be money laundering or terrorist financing ("unusual transaction"), this is disclosed

⁷³ Section 38 Wwft.

to the Financial Intelligence Unit Nederland (FIU-NL).⁷⁴ FIU-NL assesses whether an unusual transaction that was disclosed should be passed on to the investigation authorities or security services for further investigation (the **unusual** transaction is then characterized as **suspicious**.) For this purpose it assesses every disclosure, and if necessary, asks the party which made the disclosure for further information. In addition, it records the disclosures that have been made (with details of the natural persons involved) in a database. In combination with other disclosures regarding unusual transactions, or with a search query in the context of a current investigation, a transaction which was in the first instance characterized only as an unusual transaction may then be characterized as a suspicious transaction and be passed on to investigation and security services. In appropriate cases FIU-NL can also pass on a disclosure that was made to foreign sister organizations, who can in turn pass on the disclosure to local services.

Therefore a disclosure made by an institution can give rise to starting an investigation, can be used in an investigation that is already being conducted, or can be used in an investigation that was started for reasons other than the disclosure. Therefore a disclosure is also important for the FIU-NL even if it only leads to an enrichment of the data in the database. Data remain in the database for 5 years. Disclosures identified as suspicious remain in the database for 10 years.

Although the FIU-NL is part of the National Police Agency, the intention is not that every disclosure to the FIU-NL automatically and immediately becomes available to the investigating authorities. The disclosed data can be made available not only to the regular police departments, but also to other special investigation departments such as the FIOD-ECD and the AIVD. However, these departments cannot consult the database directly; they do so via the office of the National Public Prosecutor responsible for combating money laundering.

Institutions with a duty to disclose are often under the impression that they are only obliged to make a disclosure if a transaction is **suspicious**. FIU-NL and the BFT consider that in general, disclosures should also be made when there is no specific suspicion, viz., as soon as the transaction is deemed to be unusual; in the vision of FIU-NL and the BFT, FIU-NL determines whether the unusual transaction is or becomes suspicious.

This position is supported by the following explanatory text:

“The key element in the disclosure of transactions is the unusual nature of the transaction. In this respect, the Dutch disclosure regime differs from systems that focus on the suspicious nature of a transaction. One important reason for opting for the disclosure of unusual transactions is that the Disclosures Office may be deemed more capable than the institutions of determining whether a transaction must be classified as suspicious and must be communicated to the investigating authorities. The expertise of the Disclosures Office, the possibility of making a comparison with other

⁷⁴ Formerly the Unusual Transactions Disclosures Office.

disclosures and the computer file comparison with police data and other data sources are significant factors in this respect.”⁷⁵

In fact, the duty to disclose of one institution is not influenced by the duty to disclose of another institution involved in a transaction. The thinking behind this is that several disclosures about the same transaction can enrich the quality of the database and also provide greater assurance that disclosures are actually made. If a disclosure made by one institution reveals that another institution that is involved has not made a disclosure, this can lead to the FIU-NL or BFT questioning the institution that did not make a disclosure.

4.2 Unusual transaction

In accordance with Section 16 Wwft an institution must disclose an “unusual” transaction that is carried out or proposed. So-called indicators were drawn up⁷⁶ on the basis of Section 15 Wwft for the purposes of assessing whether a transaction must be classified as an unusual transaction. A distinction is made between objective and subjective indicators. For professional practitioners, two indicators have been drawn up, one objective and one subjective indicator. If the objective indicator applies to a transaction, the transaction must be disclosed. There is no room for the institution’s own assessment of the transaction and the situation in which it takes place. On the other hand, in the case of a subjective indicator, the duty to disclose in a specific situation depends on the institution’s own assessment.

4.2.1 Objective indicator

Various objective indicators apply for the different groups with a duty to disclose. These objective indicators are shown in Section II of the list of indicators accompanying the Wwft Implementing Decision. The following objective indicator has been drawn up for tax advisors and external accountants: ***“Transactions of € 15,000 or more paid to or with the intervention of the professional party in cash, with cheques to the bearer or similar methods of payment.”***

This only concerns payments *in cash*, i.e., not giro payments, payments with cheques made out to a named payee, by credit card or PIN.⁷⁷ Therefore if a customer pays the institution or a third party, with the intervention of the institution, a minimum of € 15,000 in *cash*, this must be disclosed. In the case that a customer makes or receives this sort of cash payment without the intervention of the institution, there is therefore no duty to disclose on the basis

⁷⁵ Lower House 2008, 31 238, no. 3, p. 28.

⁷⁶ Annex, list of indicators with Wwft Implementing Decision of 15 July 2008.

⁷⁷ See explanation in the brochure on the Identification and Disclosure Obligation for Professional Groups, Ministry of Finance, March 2003, p. 9.

of this objective indicator. However, the discovery of many large cash payments can lead to the application of the subjective indicator.

In the Committee on the Duty to Disclose Unusual Transactions ⁷⁸ the following agreements were made with regard to a *cash payment* by a customer into the account of a financial or legal service provider or dealer in valuable goods. *“This sort of payment does not automatically come under the service provider’s objective duty to disclose. However, if the professional concerned himself actively brings about the payment in cash into his account – for example, by referring the customer to the bank or accompanying him so that the payment is made in his presence – this concerns a “proposed cash transaction.” If the limit for disclosure is exceeded, this falls under the objective duty to disclose. Therefore there is an obligation to make a disclosure. In other cases the subjective indicator may be applicable.”* ⁷⁹

4.2.2 Subjective indicator/money laundering or terrorist financing

The subjective indicator which can be found in Part I of the list of indicators reads:

Transactions where the institution with a duty to disclose has reason to suppose that they could be related to money laundering or terrorist financing.

The Third European Money Laundering Directive ⁸⁰ indicates that this must concern *“any activity which they regard as particularly likely by its nature to be related to money laundering or terrorist financing and in particular complex or unusually large transactions and all unusual patterns of transactions which have no apparent economic or visible lawful purpose.”*

Therefore whether or not to disclose depends entirely on the institution’s subjective assessment of whether there is an activity:

- a) which the institution deems likely to be related to money laundering or terrorist financing: therefore an unusual transaction which is not likely in this respect does not have to be disclosed;
- b) complex or unusually large transactions and all unusual patterns of transactions: “unusual” is therefore a relative term: what may be usual for a large financial institution may be unusual for an SME;
- c) without an apparent economic or visible lawful purpose. Although a transaction on the basis of the previous part criteria may be unusual,

⁷⁸ A Committee established in pursuance of Section 21 Wwft, in which representatives of the Minister of Finance and the Minister of Justice hold consultations with representatives of the supervisors and of groups who make disclosures about the structure and execution of the duty to disclose and the determination of the indicators. In the WID this committee was known as the Supervisory committee for the disclosure of unusual transactions (BC MOT).

⁷⁹ Letter dated 9 June 2008 from the Director of Financial Markets to the institutions with a duty to disclose. See Annex 1.

⁸⁰ Article 20, Third European Money Laundering Directive.

there could be a legitimate economic or legal reason which explains a transaction that at first sight seems unusual. In that case there is no duty to disclose.

For the assessment of the above, the institution must weigh up all the facts and circumstances known to it, including:

- a) type of customer (legal status, type of activities);
- b) type of service normally requested by this sort of customer;
- c) type of service requested in this case;
- d) whether there could be a logical explanation for the at first sight apparently unusual transaction, and
- e) whether this logical explanation is likely and verifiable.

All the information available to the institution must be taken into consideration in this respect (if necessary, after an internal investigation). This means that the institution may well have an acceptable explanation for a transaction which was categorised as unusual by an individual professional. This also indicates the importance of the assessment at the "level of the institution" and not at the level of an individual professional who may not be entirely aware of all the relevant facts and circumstances.

For this subjective indicator there was a detailed list of examples in the MOT Act which is still useful.⁸¹ These examples do not have an exhaustive character and do not serve as a checklist, but are intended to focus attention on certain transactions which could indicate money laundering or terrorist financing. In practice, other situations could certainly also arise. If one of the examples applies, this does not automatically mean that a disclosure must be made. However, it is important to be extra alert to see whether there could be a case of money laundering or terrorist financing on the basis of the facts and circumstances available at that time.

In forming its assessment, the institution does not have an active duty to investigate and does not have to have hard evidence (in the sense of civil law or criminal law) in order to arrive at the assessment that there is a duty to disclose. As indicated above, the view of the legislator is that FIU-NL determines whether the disclosed transaction is suspicious (whether or not this is in coordination with other disclosures).

On the basis of the general duty of care⁸² which applies to the professional to deal with the interests of his customers in a careful manner, he must assess the facts and circumstances available carefully before making a disclosure. After all, a disclosure could potentially be damaging for a customer. Admittedly there is an exemption from liability for this sort of damage (Section 20 Wwft), but this exemption does not apply if the institution should not reasonably have made the disclosure in view of all the facts and circumstances.

⁸¹ Brochure on the identification and disclosure obligation for professional groups, Ministry of Finance, March 2003, see Annex 2.

⁸² For accountants also see: Professional Code of Conduct (VGC), Chapter A-140.

Because this concerns a legal obligation, the professional is exempt from the duty of secrecy contained in the various professional rules and codes of conduct. However, this exemption can only apply if the professional has convinced himself as far as possible that a disclosure must be made because, weighing up all the facts and circumstances, this is a situation which should reasonably result in disclosure. In the view of the professional organizations, the professional code of conduct of the professional (duty of secrecy and duty of care) mean that no disclosure may be made in the case of a single bare indication. Therefore, if necessary the professional must ask further questions, for example, to assess whether a transaction that at first sight seems to be an unusual transaction has a legitimate economic or legal explanation; furthermore, he must do so without indicating his intention to make a disclosure. If a possible misunderstanding about the customer's intention can simply be resolved by further questions, this approach is much to be preferred. It is important to avoid making disclosures unjustifiably because the institution does not have adequate relevant information, while this information can be obtained without any problems.

If a situation occurs which gives rise to an assessment of whether or not to make a disclosure, it is advisable to record the considerations which led to the decision to disclose or not to disclose, in a separate dossier. This is in connection with the BFT's or the Court's assessment of the care with which the decision was made. In fact the Wwft does not impose the obligation to record these considerations.

Quite apart from the Wwft, accountants are obliged anyway to record the considerations which led to the decision to disclose or not to disclose, in pursuance of other regulations that apply to accountants.⁸³

4.3 Money laundering

"Money laundering" is defined in Article 420bis (deliberate money laundering)⁸⁴ the Criminal Code and Article 420quater (guilty of money laundering)⁸⁵ of the Criminal Code.

⁸³ Article A100.4 VGC in conjunction with RKBI (in particular, Article 94), in conjunction with Guideline 11 (for Accounting Consultants), in particular, Chapter 7.

⁸⁴ Article 420bis.

The following person, guilty of money laundering, is punished with a prison sentence of a maximum of four years or a fine of the fifth category:

1. a. he who hides or conceals the true nature, origin, place of discovery, sale or movement of an object, or hides or conceals who is the beneficiary of an object, or has it in his possession while he knows that the object is directly or indirectly proceeding from an offence;
- b. he who acquires, has possession of, transfers, deals or makes use of an object, while he knows that the object is directly or indirectly proceeding from an offence.
2. Objects include all goods and property rights.

⁸⁵ Article 420quater:

The following person, guilty of money laundering, is punished with a prison sentence of a maximum of one year or a fine of the fifth category:

One aspect of the concept of money laundering is that the perpetrator knows or should reasonably suspect that the money comes from an offence (predicate offence or the underlying offence). In this respect it is not required that the underlying offence can be precisely identified, that it has been established beyond doubt that it was committed or that there has been a conviction for the underlying offence.⁸⁶

It should be noted that it is not relevant whether the offence was committed in the Netherlands or outside the Netherlands (or could have been). Therefore no territorial restriction applies with regard to the offence from which the money was obtained. After all, the rationale of the original provision was in connection with combating drug offences. The Dutch penal provision is the implementation of the Second European Money Laundering Directive. In this context it mentions, amongst other things, the criminal acts described in the Vienna Convention, activities of criminal organizations, serious fraud, corruption and criminal acts which can produce high returns and for which a long prison sentence applies, according to the criminal law of the Member State. Terrorist financing was subsequently added to this list.

The definition of money laundering indicates that merely *having possession of* money which one knows or should reasonably suspect has proceeded from an offence can be qualified as money laundering.

As money laundering has been made a criminal act under the Dutch Criminal Code, there must be a relationship with the Netherlands regarding the money laundering offence. This could concern money laundering by a customer in the Netherlands or from the Netherlands. It is conceivable that an institution discovers possible money laundering in the context of services provided to a foreign customer. If there is no connection with the Netherlands, the possibility cannot be excluded that there is a duty to disclose for a foreign institution. This can certainly arise in the other EU Member States.

It is not necessary for the customer himself to be the (main) suspect of the possible money laundering transaction. If the customer has unconsciously participated in an unusual transaction, a disclosure must also be made.

The following paragraph looks at the question whether a suspicion of tax fraud falls under the duty to disclose. It should be pointed out that having possession

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1. a. he who hides or conceals the true nature, origin, place of discovery, sale or movement of an object, or hides or conceals who is the beneficiary of an object, or has it in his possession while he must reasonably suspect that the object is directly or indirectly proceeding from an offence;
 - b. he who acquires, has possession of, transfers, deals or makes use of an object, while he must reasonably suspect that the object is directly or indirectly proceeding from an offence.
 2. Objects include all goods and property rights.

⁸⁶ For a good summary of the relevant texts, see the findings of the Procurator General in the Supreme Court, Supreme Court, 7 October 2008, no. 03511/06, LJN:BD 2774.

of goods or property rights obtained by other forms of fraud can also be qualified as money laundering.⁸⁷

4.3.1 Is tax fraud money laundering?

For tax advisors and accountants it is very important to know whether the suspicion of **tax fraud** falls under the duty to disclose.

Up to the decision of the Supreme Court referred to below, the lower courts were divided⁸⁸ about this question and there appeared to be a trend that the mere fact that there was a question of dirty money/dirty income from otherwise legal activities did not lead to the conclusion that this money was the “objects proceeding from any crime”. This means that there would be no question of money laundering merely because the money was alleged to have come from tax fraud, and therefore there would be no duty to disclose in those cases.

However, the Supreme Court recently pronounced a judgement which appears to put an end to this discussion:⁸⁹

In the statement with this judgement, the Procurator General stated:

20. If the penalisation of money laundering were not to apply to the proceeds from fiscal offences, this could lead to a lack of enforcement with regard to the proceeds which could then be generated by the proceeds from fiscal offences...

21. The question then is whether so-called “dirty money” earned by means of legal activities, can be identified as an object proceeding from any offence, as referred to in Article 420bis and Article 420quater.

*22. In my opinion, a sum that is wrongly not paid to the tax authorities proceeds from an offence in the sense of the provisions concerned.
(underlining: authors of these guidelines)*

The key consideration of the judgement pronounced below reads:

The Court clearly based the judgement given above ... that the suspect must be acquitted of the charges, on the fact that the assets in his possession as a result of tax evasion cannot be designated as “proceeding from an offence”

⁸⁷ For accountants, COS 240, paragraph 86c on the possibility of the concurrence of fraud and the (former) MOT Act is relevant in this context.

⁸⁸ Court of Amsterdam, 4 April 2003, case no. 23-001395-01, LJN AF 6887, in higher appeal against the judgement of the Court of Amsterdam, 1 November 2000, case no. 13-009039-00, LJN AA 7998. In the same case, also see the Court of Amsterdam, 3 May 2002, case no. 13/120070-98, LJN AE 2270; Court of Amsterdam, 14 March 2006, LJN AV 4924; Supreme Court, 21 December 2007, LJN BA8463; Court of Breda, 23 November 2007, LJN: BB 8749; Court of Arnhem, 6 August 2008, nos. 21-002965-07 and 21-002966-07, LJN: BD 9335 and 9342; Court of Amsterdam, 11 June 2008, no. 23-003858-07, LJN: BE7125.

⁸⁹ Supreme Court, 7 October 2008, 03511/06, LJN: BD 2774.

in the sense of Article 420bis and 420quater Criminal Code. This judgement reflects an incorrect interpretation of the law. These assets can be designated as proceeding from an offence to this extent in the sense of the above-mentioned provisions. (underlining: authors of these guidelines)

This appears to have definitively decided the discussion which was already conducted under the regime of the MOT Act.

Therefore with regard to tax evasion, dirty money/dirty income count as “proceeding from an offence” on the basis of this judgement. As merely being in possession of such assets can be qualified as money laundering,⁹⁰ there will be an “assumption” that (a transaction/situation) could be related to money laundering/terrorist financing” if there is a suspicion of tax fraud, and this must then therefore be disclosed.

The question that arises is when there should be a suspicion that tax fraud may be involved. For tax fraud, deliberate intent is required. The case which resulted in the judgement of the Supreme Court of 7 October 2008 concerned income from car dealing of which the tax authorities were not informed, a clear case of tax fraud.

The reality is that these clear and unambiguous situations in which it is obvious for the professional that the taxpayer deliberately submitted an incorrect tax return are rare. According to the jurisprudence of the Supreme Court, “intent” should also be interpreted to cover conditional intent. In this connection provisional intent involves consciously accepting a significant probability that an incorrect tax return has been submitted. In practice it will not always be easy to assess whether there is a suspicion of “conditional intent”, and this assessment should be made in every individual case. In cases where there is a suspicion of conditional intent, the professional organizations also consider that tax fraud could be involved and that there is therefore a duty to disclose in pursuance of the Wwft.

The professional organizations consider that in the cases in which taxpayers change or supplement tax returns, when it becomes clear that they have been incorrectly filled in after they were submitted (the so-called supplementary tax returns or additional tax returns), this does not involve tax fraud. After all, the intent that was required does not apply.

The professional organizations recommend that when tax fraud is discovered, or there is a suspicion of any form of tax fraud, this should always be carefully recorded in the dossier.

⁹⁰ Article 420bis, paragraph 1, letter b, Criminal Code.

4.3.2 What to do if the taxpayer appeals to voluntary disclosure

On the basis of Article 67n and Article 69, paragraph 3 of the State Taxes Act, a taxpayer can make a voluntary disclosure by making a correct and complete tax return or by providing correct and complete information, data or indications before he knows or can reasonably suspect that the tax inspector knows or will know of the incorrect or incomplete return.

In situations where a tax advisor or accountant is confronted with incorrect or incomplete returns, he can only advise the customer, on the basis of his professional code of conduct, to take the voluntary disclosure route. In situations involving voluntary disclosures there will often be an unusual transaction (see 4.3.1). It is important to determine what service is provided in the specific case concerned. Depending on the circumstances of the case, it is actually quite conceivable that the services to the customer consist of determining his legal position and giving advice about avoiding legal proceedings, or acting as his representative before the court, viz., in those cases where there may also be a substantive difference of opinion with the tax authorities. In that case the tax advisor does not have a duty to disclose. If taxpayers who want to make a voluntary disclosure are no longer able to freely discuss the threat of legal proceedings with an advisor, on the basis of the Wwft, the Wwft would be in conflict with the European Convention for the Protection of Human Rights.⁹¹ The professional organizations assume that this is not the intention.

It should be pointed out that the BFT gives a more restrictive explanation of the terms “determining the legal position” and “avoiding legal proceedings”, and therefore often considers that there is a duty to disclose in situations where taxpayers make voluntary disclosures.

The BFT adopts the view that there is also a duty to disclose all other forms of discussions with the tax authorities which involve unusual transactions. The Court of Rotterdam⁹² permitted the BFT to impose an order subject to a penalty on a tax advisor in one case. This advisor had made a compromise with the tax inspector about the fiscal approach to a particular situation which was characterised as an unusual transaction by the BFT.

4.4 Terrorist financing

This is defined in Section 1, paragraph 1, subsection i Wwft. Although the aim of this legislation is clear, it is not at all clear how professionals are expected to detect situations which might involve terrorist financing. From a practical point of view, institutions will have to devote greater attention to flows of money that are discovered or proposed to persons and/or organizations in countries where it is public knowledge that terrorism exists.

⁹¹ Article 6 ECHR, free access to the court.

⁹² The Court of Rotterdam, 18 March 2008, LJN BC7312. An appeal was lodged against this judgement.

4.5 Proposed transactions

The duty to disclose not only applies to unusual transactions that are carried out, but also to proposed unusual transactions. “Proposed transactions” refers to transactions where the customer has already made and concluded the decisions, while these have not (yet) been carried out. The interpretation of this term corresponds to the term “emphatic intention” used in fiscal jurisprudence.⁹³

In most offices it is not customary to accept cash payments for services. If a customer insists on this sort of payment, it may be the case that the institution has to disclose this as a proposed unusual transaction, even if the institution does not accept the cash payment. If the customer insists on making a cash payment of a sum of € 15,000 or more, a disclosure must be made on the basis of the objective indicator. In the case of a sum lower than € 15,000 there may be a suspicion of money laundering or terrorist financing.

4.6 To which transactions does the duty to disclose apply?

In the MOT Act there was a relationship between the unusual transaction and the service provided by the institution (unusual transaction “for this” – Section 9, paragraph 1, MOT Act). This section was amended in the Wwft. It is no longer the service that is the key aspect, but the service provider acting in a professional or business capacity. Even if the service does not focus specifically on the unusual transaction, the institution must disclose an unusual transaction that is discovered.

If the customer asks the institution for its active cooperation for transactions which could be indicative of money laundering or terrorist financing, the institution must certainly disclose this.

Apart from the above-mentioned “active involvement” of the service provider, there may also be “passive involvement”. This could be a tax advisor who notices an unusual transaction in some way in the tax return when doing the tax return for his customer, or an accountant who notices an unusual transaction in some way in the customer’s administration. In the opinion of the professional organizations there is also a duty to disclose in these cases.

Quite apart from the active or passive form of involvement described above, an institution can also notice an unusual transaction without any form of involvement of the customer. An example could be an unusual transaction found in a takeover target in the context of drawing up a tax due diligence report which the tax advisor is commissioned to draw up by a potential buyer. In view of the

⁹³ In broad terms this means that merely the expectation that a transaction is being considered is insufficient; there must be a specific intention to carry it out, reflected in the actual behaviour. Therefore there must be a wilful decision to carry out a plan with a specific content. To the institution it must be clear from the facts and circumstances that a plan with a specific content will be carried out.

broader text of the Act in Section 16 Wwft, a disclosure must probably be made even if the customer himself is not involved in the unusual transaction of the target. However, there is some doubt about this in view of the description of the disclosure data in Section 16, paragraph 2 Wwft, which still mentions the link with the customer. (What is the point of disclosing detailed data about the customer – the buyer – while it is logical that only the details of the target are relevant?)

The BFT considers that in view of the broad text of Section 16 Wwft, a disclosure must also be made if the institution discovers an unusual transaction in the context of its professional or business activities on behalf of the customer, even if the customer is not involved himself.

To summarise, the professional organizations have come to the following interpretation of Section 16 Wwft:

- An unusual transaction must certainly be disclosed if the customer is involved in the transaction and the service concerns the transaction itself or involves dealing with that transaction or its consequences.
- An unusual transaction should probably be disclosed if, in the context of its professional or business activities, the institution discovers an unusual transaction in which the customer is not involved himself.

4.7 When should an assessment be made of the duty to disclose?

The assessment of whether there is a duty to disclose is a continuous process. One logical moment for assessment is when the relationship is established, when the institution must investigate the objective and envisaged nature of the business relationship.⁹⁴ Another moment is the moment at which it becomes aware that an existing customer intends to carry out a new transaction, and also when further information becomes available about transactions already being carried out (or which had already been carried out). This follows from the obligation “where possible, to carry out constant monitoring of the business relationship and the transactions conducted during the existence of this relationship, in order to ensure that these tally with the knowledge which the institution has of the customer and the customer’s risk profile, and to check the source of the assets where appropriate.”⁹⁵

This is also known as “monitoring”.

It is important to point out that this is an obligation of the *institution*. Because it is quite possible that relevant information about several persons is spread amongst different people in the institution, the institution must have procedures to ensure as well as possible that all the professionals in the institution who are working on a specific customer are aware of relevant information about the risk

⁹⁴ Section 3, paragraph 2, subsection c Wwft.

⁹⁵ Section 3, paragraph 2, subsection d Wwft.

profile, so that they are able to recognise deviations from the expected pattern of transactions.

4.8 Exceptions to the duty to disclose when an unusual transaction is discovered

On the basis of Section 1, paragraph 2 Wwft, the duty to disclose does not apply to tax advisors and lawyers, civil-law notaries and other legal professionals insofar as they perform activities for a customer in relation to the determination of the latter's legal position, representation and defence before the courts, the provision of advice before, during and after legal proceedings, or the provision of advice about instituting or avoiding legal proceedings (see 2.4).

4.9 What data must be disclosed?

As far as possible, the disclosure must contain the following data:

- the identity of the customer, and as far as possible, the identity of the party on whose behalf the transaction is carried out (viz.: UBO);
- the nature and number of the customer's identity document;
- the nature, time and place of the transaction;
- the size, destination and origin of the money, securities, precious metals or other assets involved in a transaction;
- the circumstances on the basis of which the transaction was characterised as being unusual;
- other data indicated by AMvB (up to now, AMvB has not indicated such data).

In addition, it is useful to note that discussions with FIU-NL have shown that the data collection of FIU-NL is organized on the basis of data of natural persons and not on the basis of data of legal persons. Therefore FIU-NL will in particular be interested in data about natural persons involved in the unusual transaction.

4.10 Within what period must a transaction be disclosed?

An unusual transaction must be disclosed by the institution within fourteen days of establishing the unusual nature of the transaction.⁹⁶

4.11 How and to whom should the unusual transaction be disclosed?

The duty to disclose applies to the institution. It is advisable for every institution to draw up an internal disclosure procedure and circulate it to all its employees. This means that disclosures are first made internally to a central disclosures office (risk manager or compliance officer) in the institution, and can then be

⁹⁶ Section 16, paragraph 1 Wwft.

assessed centrally. For the central assessment of an internal disclosure made by an employee of the institution, all the information available in the institution must be taken into account, insofar as this is reasonably possible. For large assignments it is quite possible that an individual advisor/accountant only has part of all the relevant customer information and characterises a situation as being unusual on the basis of that limited knowledge. In that case it is advisable to involve all the available information in the assessment after the internal disclosure, and it is possible that in this broader context the situation will not be characterised as being unusual.

The central disclosures office then makes the disclosure to FIU-NL, on behalf of the institution.⁹⁷ FIU-NL expects disclosures to be made on the internet, after the institution has notified the FIU-NL. For the disclosure procedure, see Wwft.fiu-nederland.nl.

FIU-NL can ask the party making the disclosure for additional information about the unusual transaction, such as further information about the customer, the goods involved or the situation. The party making the disclosure is obliged to answer these questions on the basis of Section 17 Wwft. FIU-NL is not an investigating authority, and therefore does not have any investigating powers (under criminal law) itself.

The data about the services which are provided must be retained in an accessible manner for five years after the disclosure was made (Section 34 Wwft).

4.12 Liability in the case of disclosure

A tax advisor or accountant has a duty of secrecy insofar as the law does not demand otherwise. Therefore in those cases that the Wwft obliges the service provider to make a disclosure, this disclosure is not in conflict with the duty of secrecy. However, if the service provider is not sufficiently careful with regard to making a disclosure, this could lead to a breach of the duty of secrecy and to disciplinary liability.

There is an indemnification for the Wwft under civil law. This entails that an institution is not liable under civil law for damage sustained by someone else (the customer or a third party) as a result of a disclosure, unless it is demonstrated that no such disclosure should reasonably have been made in view of all the facts and circumstances (Section 20 Wwft). The same sort of indemnification applies with regard to a criminal prosecution of the institution (Section 19 Wwft).

If a disclosure is made because the institution did not assess all the facts and circumstances known to it sufficiently carefully, and/or did not ask any further

⁹⁷ Financial Intelligence Unit Nederland (FIU-Nederland), Postbox 3016, 2700 KX Zoetermeer, telephone number: 079-345 96 81, fax number: 079-345 87 68, e-mail: MOT@euronet.nl, internet: www.fiu-nederland.nl

questions which it could easily have asked, the institution therefore runs the risk that despite the above-mentioned indemnification under civil law, it will still be held liable for making a careless disclosure.

Therefore it is extremely important for an institution to carry out a careful and professional assessment of the facts and circumstances in a structured and coordinated way, before making a disclosure.

4.13 Confidentiality in respect of the disclosure

On the basis of the Act the institution may not inform the customer that a disclosure will be made or has been made.⁹⁸ If the institution does so, this could result in a criminal act.

The institution is permitted to discuss the facts and circumstances with the customer in order to make a careful assessment of whether there is a duty to disclose. However, it may not inform the customer that this is being done in the context of an assessment of the situation for the purposes of a possible disclosure under the Wwft.

In addition, the institution may try to persuade the customer to refrain from carrying out a proposed transaction which is defined as an unusual transaction.⁹⁹ It may not tell the customer that it will make a disclosure if the customer carries out the transaction anyway.

COS 240 imposes an obligation on the accountant to inform the management of the entity or the supervisory authority in writing of indications of fraud, insofar as he does not deem this to be in conflict with the aim of his investigation. If the fraud also entails a possible unusual transaction in the context of the Wwft, providing this information is not prohibited. It is only prohibited to confirm that the accountant will make a disclosure pursuant to the Wwft. If he is asked, the accountant must indicate that he cannot answer such a question.

In contrast with the MOT Act, the Wwft contains exceptions to the duty of secrecy: these exceptions permit the institution to exchange information with – briefly – parts of its own organization or the network elsewhere and/or other institutions which fall under the scope of the anti-money laundering regulation in the context of the objective of this legislation (“warning systems”). Detailed conditions apply for this, which are listed in Section 23, paragraph 4 Wwft.

⁹⁸ Section 23, paragraph 1 Wwft. This is the so-called “tipping off” prohibition.

⁹⁹ Section 23, paragraph 3 Wwft.

4.14 Consequences of a disclosure for the institution and its employees

The Wwft does not require the institution to terminate its services as a result of a disclosure. However, the institution will involve the facts and circumstances in its assessment of whether the relationship with the client can be continued.

Indirectly, there may be a possible obligation to terminate the relationship. The Wwft prescribes a new identification procedure, to put it briefly, when doubts arise with regard to information provided earlier by the customer or if there is a suspicion of money laundering or terrorist financing.¹⁰⁰ Depending on the facts and circumstances, this will probably have to result in enhanced customer due diligence. If the customer due diligence did not produce the desired result, the institution must terminate the relationship.¹⁰¹

Furthermore, the institution must carefully assess whether continuing with the services could lead to becoming complicit or an accessory to a criminal act (assistance with money laundering or terrorist financing).

Insofar as the professional organization, of which the professional working in the institution is a member, has its own rules with regard to the termination of the relationship in the case of a suspicion of money laundering or terrorist financing, these rules can oblige the institution to terminate the relationship.¹⁰²

Finally, it should be noted that if the disclosure ultimately leads to prosecution, the disclosure and the data of the party who made the disclosure will form part of the criminal dossier and will therefore become available to the persons involved in the (proposed) transaction that was disclosed. According to the Explanatory Memorandum, the intention is that the names of the employees involved of the institution are omitted as far as possible from the disclosure to protect them from the possibility of threats. Insofar as these names are included in the disclosure, the FIU-NL can omit these names when the disclosure is passed on. However, the possibility cannot be excluded that the names will appear in the dossier in a follow-up investigation. In that case, the criminal regulation with regard to threatened and anonymous witnesses would have to provide a solution.¹⁰³

4.15 Informing a succeeding accountant or tax advisor of the disclosure

Under the MOT Act it was not permitted to inform a succeeding accountant or tax advisor of mere fact that a disclosure was made on the basis of the MOT Act.

¹⁰⁰ Section 3, paragraph 3, subsections c and e Wwft.

¹⁰¹ Section 5, paragraph 1 Wwft.

¹⁰² For example, this applies for tax advisors who are members of the NOB on the basis of the NOB Special Code of Conduct: NOB Special Code of Conduct, 16 May 1995; NOB Yearbook 2008, pp. 40-49; can also be found on <http://www.nob.net/Bijzondere-gedragscode-NOB>

¹⁰³ Lower House, 2007-2008, no. 31 237, no. 3, p. 5.

Under the Wwft this is permitted, provided that this is done to prevent money laundering and terrorist financing.¹⁰⁴

In addition, it is possible to notify the succeeding institution of the reason for terminating the relationship in general terms if this is an obligation under the institution's own code of conduct.¹⁰⁵ After all, in the context of a careful transfer of the dossier, it is in general advisable to inform the succeeding accountant/advisor of the nature and scope of the facts and circumstances which were discussed with the customer's management.

4.16 Feedback after disclosure

It is FIU-NL's aim:

- To send a confirmation of a receipt within five days of receiving the disclosure;
- To individually investigate all disclosures by professionals;
- To send feedback to the party which made the disclosure about passing a disclosure onto investigating authorities (if it has been characterised as being suspicious), but only to a section of the party that made the disclosure which has no direct contact with the customer (e.g., a compliance department). In many cases there will not be any feedback when the disclosure is used in a criminal investigation, so that this investigation is not compromised. In practice this feedback therefore obviously does not take place to professionals;
- To send a concluding report to the party that made the disclosure at the end of any criminal investigation involving the disclosure (however, it is not yet clear whether and how this will be done in concrete terms).

However, at the moment it is not yet clear how FIU-NL will be able to implement these aims in practice. On the basis of recent comments by the Committee on the Duty to Disclose Unusual Transactions, feedback on the content of disclosures only seems to take place to institutions which FIU-NL considers to have a compliance department which does not maintain contact with customers. This is in order to prevent a possible investigation from being compromised because the customer was tipped off. Feedback will probably only be given to larger financial institutions.

¹⁰⁴ Section 23, paragraph 4, subsection c Wwft.

¹⁰⁵ Tax advisors who are members of the NOB must notify a succeeding tax advisor of the termination of the relationship, indicating only that this took place "for reasons as referred to in the NOB Special Code of Conduct."

5 Supervision and enforcement

The Financial Supervision Office (BFT) ¹⁰⁶ was appointed to supervise compliance with the WFT by the professions. This means that an institution can expect an (unannounced) visit by employees of this body at any time, within the limits of the principles of sound administration. This could be a regular periodic investigation or a risk-based investigation. The latter are carried out if the BFT considers, as a result of consulting public sources, or as a result of information obtained in earlier investigations, that there is a higher than average risk that the Wwft is not being correctly observed.

The BFT checks whether the institution has observed the obligations in pursuance of the Wwft. In this respect it checks whether the institution has adequate internal procedures and instructions with regard to customer due diligence and the duty to disclose, and whether the control of these matters is adequately organized. In addition, it also checks whether the procedures are applied in practice. As a rule a number of dossiers are checked for this purpose.

5.1 Supervision for a risk-based approach

The introduction of a risk-based approach as a guideline for performing customer due diligence creates the necessary room for institutions. This approach entails that institutions themselves assess the risks with regard to certain customers and/or types of services, and that institutions gear their efforts with regard to customer due diligence to this assessment. The Explanatory Memorandum to the Wwft (p. 6) explicitly states that in practice there may be a good reason for institutions to assess the risks of comparable products differently. According to the Explanatory Memorandum, "A supervisor will obviously take full account of these factors". Therefore arguments must be given for the choices that are made.

The professional organizations will draw up a model risk policy, ¹⁰⁷ which is also based on the FATF's Guidance for Accountants in Practice on Implementing a Risk-based Approach to the FATF. Here too, there may be a reason for an institution to assess the risk differently, for example, because of the type of customers or the type of transactions that are usual for the institution.

In practice the supervision will amount to assessing the risk policy (test of reasonableness) with regard to accepting customers, the internal organization of the institution with regard to identifying and passing on possible unusual transactions internally, and assessing the measures which the institution has

¹⁰⁶ This office is an independent administrative body operating since 1999, responsible, amongst other things, for the financial and administrative supervision of the notarial profession and court bailiffs. Since June 2003 the supervision of compliance with the WID and the MOT Act by professionals has been added to this. Postbox 14052, 2508 SC Utrecht, telephone 030 251 69 84, <http://bureaufn.nl>

¹⁰⁷ Can be consulted on the websites of the professional organizations (e.g.: <http://www.nob.net/?q=Wwft>)

taken to ensure that the policy is observed in practice. Therefore it is recommended, though not for that reason alone, that the internal organization in respect of the Wwft is correctly recorded in internal instructions and directives, and that good records are kept of internal disclosures and the results of the investigation into such disclosures.

In addition, the BFT shall focus attention on the measures which the institution has taken to ensure that employees are able to recognise an unusual transaction (MOT awareness). In this context the Wwft contains a training obligation.¹⁰⁸

5.2 Competences

5.2.1 General

The BFT is competent partly on the basis of the General Administrative Law Act (hereinafter: "Awb"). The Awb grants broad competences. For example, the supervisor is competent, taking along the necessary equipment, to enter any location, with the exception of a house, without the inhabitant's consent. This may be important for a professional who has an office in his home. If necessary the BFT can gain access with the use of force, accompanied by persons appointed by the BFT. The BFT is competent to ask for information and demand to see business data and documents and make copies of them. If that is not possible, the BFT can take the data and documents to make copies of them. In addition, the BFT can oblige everyone to provide all the cooperation that can reasonably be demanded within a reasonable period.

The Awb provides that the supervisor shall only use his powers insofar as this is reasonably necessary to perform his task. This principle of proportionality is laid down in Article 5:13 Awb.

Obviously the BFT employees must be able to provide proof of identity. It is advisable for the professional to demand this before cooperating. It is also advisable for the professional to ask the BFT what the purpose of the investigation is.

5.2.2 Inspecting the dossiers

The BFT has the right to *demand* to inspect the dossiers.¹¹⁰ A party which has a duty of secrecy on the basis of its office, profession or a legal regulation, can refuse to cooperate insofar as this arises from its duty of secrecy (Article 5:20,

¹⁰⁸ Section 35 Wwft. The professional organizations have developed a Wwft e-learning module for this purpose to teach this MOT awareness on the basis of a case related to the professional group. This e-learning module can be adapted to the current situation fairly regularly. The BFT has indicated that in principle, it considers that the training obligation is properly observed by following this training every two or three years.

¹¹⁰ This demand must be explicitly passed on to the customer by the tax advisor or accountant in order to avoid the legal reproach that the inspection was permitted without obligation.

paragraph 2 Awb). The professional organizations adopt the view that this does not apply for tax advisors and accountants. The duty of secrecy of tax advisors has a private law nature; that of accountants is based on the VGC.¹¹¹ The duty of secrecy of tax advisors and accountants is superseded by the right to inspect accorded to the BFT by law. However, the principle of proportionality of Article 5:13 Awb does apply to this right to inspect at all times. For example, if the BFT asks for a comprehensive inspection of a dossier that is exempt from the Wwft (for example, a dossier concerning the determination of a customer's legal position, the provision of advice before, during or after legal proceedings, etc., see paragraph 2.4), it is recommended to refuse this. If the BFT wants to assess whether the content of a dossier actually falls under the exceptions that are mentioned, it will only have to make a marginal assessment of the content for this purpose, without an examination of the content of the dossier. In that case the representative of the institution could go through the dossier with the BFT, showing only those parts of the correspondence, etc. which reveal that this dossier does not actually fall under the BFT's right to inspect. Therefore it is extremely important to organize separate dossiers for these activities.

In addition, it should be pointed out that the Wwft and its predecessors, the WID and the MOT Act, only became applicable to accountants and tax advisors on 1 June 2003. Therefore the inspection of the BFT cannot logically extend to dossiers which were closed before that date. This could be different in the case of a continued customer relationship.

5.2.3 Disclosures

If the BFT discovers facts which could be indicative of money laundering or terrorist financing, the BFT must notify FIU-NL itself.¹¹² Therefore imposing limits on the BFT's right to inspect is not insignificant. If there were a comprehensive right to inspect dossiers for which the professional has an exemption from the duty to disclose, this exemption would become meaningless because of the BFT's duty to disclose.

5.2.4 Giving instructions

The BFT can issue instructions to an institution about the development of internal procedures and controls to identify risks of money laundering and terrorist financing. The BFT can also give instructions in respect of the training of employees in the context of the Wwft and the recognition of money laundering transactions.¹¹³ Penalties can be imposed to enforce compliance with these instructions. The instructions are aimed at ensuring the correct implementation of the Wwft. It may be assumed that the general principles of sound

¹¹¹ Chapter A-140 VGC.

¹¹² Section 25 Wwft.

¹¹³ Section 32 Wwft.

administration are applicable in this respect. Therefore the BFT is not free to give any instructions it considers necessary on the basis of its own insights.

5.3 Sanctions

There are several possibilities in the Wwft regarding sanctions and enforcement: administrative, criminal and disciplinary sanctions.

5.3.1 Administrative or disciplinary sanctions

Amongst other things, the BFT is competent to impose a fine or an order subject to a penalty on the supervisor when it discovers a breach of the Wwft, or in the case of the refusal to cooperate.¹¹⁴ The fines can vary from € 2,722.50 for institutions with a turnover of less than € 45,000 to € 2,780 for institutions with a turnover of at least € 453,800.¹¹⁵

The competence to impose a fine or an order subject to a penalty does not apply with regard to professionals who are subject to disciplinary law. The Explanatory Memorandum refers to institutions which have a “statutory” disciplinary law, such as accountants, lawyers and civil-law notaries. However, the restriction to statutory disciplinary law cannot be found in the text of the Act, and consequently tax advisors against whom the BFT can submit a disciplinary complaint with the private law disciplinary court of a professional organization may also belong to a group which cannot have a fine or order subject to a penalty imposed on them. The BFT adopts the view that this is possible. The NOB recently gave the BFT the right to institute a complaints procedure against an NOB member.

5.3.2 Possibilities of appeal

It is possible to lodge an appeal against decisions pronounced on the basis of the Wwft with the Court of Rotterdam within six weeks.¹¹⁶

5.3.3 Criminal sanctions

Anyone who does not observe the provisions of the Wwft is committing an economic offence.¹¹⁷ If there is no deliberate intent involved, this concerns a breach which is punishable by detention of a maximum of six months, or a

¹¹⁴ Sections 26 and 27 Wwft

¹¹⁵ Section 28 Wwft with Annex.

¹¹⁶ Section 30 Wwft.

¹¹⁷ Section 1, sub 2° and Section 6, paragraph 1, 2° and 4° Economic Offences Act.

maximum fine of the 4th category. ¹¹⁸ If it is deliberate, it concerns an offence for which there is a maximum prison sentence of two years or a maximum fine of the 4th category. Additional penalties may also be imposed, including the partial or entire closedown of the convicted party's company in which the economic offence was committed, for a maximum period of one year.

The FIOD-ECD is charged with investigating breaches of the Wwft. The institution and the persons who were the actual leaders with regard to the conduct designated as a criminal act are liable to punishment. ¹¹⁹

It is clear that in most cases offences will be dealt with under administrative or disciplinary law. The nature and seriousness of the offence, repeated offences or the need for an investigation with the related competences may be a reason for a criminal prosecution. In practice the BFT will discuss this with the Public Prosecutions Department. If the BFT opts for an administrative fine or disciplinary measure, the option of the criminal court is excluded and vice versa (concept of "una via").

¹¹⁸ This concerns a fine with a maximum of € 18,500 (Article 23, paragraph 4, Criminal Code). For a legal person, an unincorporated company or a partnership, a maximum fine of € 74,000 is possible under certain circumstances (Article 23, paragraphs 7 and 8 Criminal Code).

¹¹⁹ Article 51 Criminal Code.

Appendix 1: Agreements on cash payments

Director of Financial Markets

Ministry of Finance

Date	Your letter (ref)	Our reference	Information
09 JUN 2008		FM 2008-01325	B.M.J. Slot LL.M.

Subject
Cash payment into the account of a non-payment holder

To institutions and service providers with a duty to disclose

The Working Group on Indicators and the BC MOT referred to cash payment into the account of non-payment holders. This concerns a payment of cash by a customer into the account of a financial or legal service provider, or to a dealer in very valuable goods. The reason for the discussion on this subject was the finding that there could be a shift from direct payment in cash to a payment into the account of the service provider or dealer. This raised the question of how parties making a disclosure should deal with this. The following practical agreements were made about this in the BC MOT.

A cash payment into the account of the service provider or dealer does not automatically fall under the objective duty to disclose. However, if the service provider or dealer actively organizes for cash to be paid into his account himself – for example, by referring the customer to the bank or accompanying him so that the payment takes place in his presence – this is a “(proposed) cash transaction”. If the limit for disclosure is exceeded, this falls under the objective duty to disclose. The service provider or dealer therefore has an obligation to make a disclosure. In other cases the subjective indicator may be applicable. In that case it is up to the service provider or dealer to assess whether the facts and circumstances are a reason to suspect that the cash payment could be related to money laundering or terrorist financing. I hope that I have given you sufficient information. For questions, you can contact your supervisor or the FIU Disclosures Office.

The Director of Financial Markets

B. Ter Haar

Appendix 2: Guidelines for detecting unusual transactions.

From the brochure “Identification and Disclosure Obligation for Professionals”, Ministry of Finance, March 2003

General guidelines

General guidelines for professionals for the disclosure of unusual transactions on the basis of the Disclosure of Unusual Transactions (Financial Services) Act

Recommendation 28 of the Financial Action Task Force on money laundering (FATF) recommends that the competent authorities “establish guidelines that will assist in detecting suspicious patterns of behaviour by their customers”. The areas of attention and the examples described below serve this purpose. These areas of attention and the examples contained in them do not have an exhaustive character and do not serve as a checklist, but are intended to focus the attention. In fact, in practice other situations can certainly also arise.

If one of these situations arises, this does not automatically lead to a duty to disclose. In the cases mentioned in the guidelines, the professional must be alert in this respect and examine the facts and circumstances known at the time to see whether there is reason to suppose that the (proposed) transaction could be related to money laundering.

Not all the examples given will be relevant for all professional groups in all cases.

Insofar as internal guidelines and indicators have already been drawn up for various professional organizations, these can also continue to serve as an example.

A. Transactions with regard to countries and territories

Example 1 Services for or via residents or companies from countries or territories which do not adequately comply with the recommendations of the FATF, and in particular, countries and territories which are on the FATF's list of non-cooperative countries and territories (www.fatf-gafi.org)

B. Unusual transactions with regard to verifying the customer's identity

Example 1 It is a problem to establish the identity of the customer or the beneficial owner.

Example 2 The customer clearly makes use of the services of a "front man".

Example 3 The correspondence address differs from the regular address. The absence of a regular address for the customer or for entities used by him. The customer does not wish to receive correspondence addressed to him at a regular address.

Example 4 Persons who do not appear to have a formal position registered in the register of companies, who are nevertheless actually in control.

C. Unusual transactions with regard to the relationship between the professional and the customer

Example 1 The service required by the customer does not correspond to the usual pattern of the professional. The usual reasons which exist for making use of the services of the professional appear to be absent.

Example 2 The customer is prepared to pay a sum for the professional's services which is substantially higher than the customary sum

Example 3 The customer appears to have changed advisor (civil-law notary, lawyer, tax advisor or accountant) several times in a short space of time, while the professional cannot see an acceptable explanation for this.

Example 4 A relationship between the customer and another advisor appears to have been refused or terminated, while the professional cannot see an acceptable explanation for this.

D. Unusual transactions with regard to the services or commission after entering into the relationship

Example 1 The customer is involved in transactions – which may or may not be one-off transactions – which are unusual because they do not correspond to the usual professional or business activities of the

customer, while the professional cannot see an acceptable explanation for this.

- Example 2 Transactions which are unusual because of their scope, nature, frequency or the manner in which they are carried out.
- Example 3 The customer or the intermediary is only prepared to provide the required information, for example, about the origin of money, after a great deal of insistence.
- Example 4 The task (only) concerns storing documents or other goods, or holding large deposits of money.
- Example 5 An object is traded several times in a short period of time.
- Example 6 Transactions of which it is known in advance that they will make a loss.
- Example 7 The unusual early repayment of assets, in particular with the request to make payments to third parties which are apparently unrelated to the customer.
- Example 8 (Cash) purchase of assets, soon followed by loans using these assets as a pledge.

E. Unusual transactions with regard to financial transactions

- Example 1 The customer has a preference for assets which do not leave any traces, such as cash, bearer documents, and bearer policies.
- Example 2 Sales and purchases for prices which are significantly different from the market price.
- Example 3 There is an unusual pattern of payments. The money in the customer's possession originates from unclear sources or the sources indicated by the customer are improbable or inadequately documented.
- Example 4 Sudden large payments from abroad: unusual (currency) transactions, for example, for cash, cheques to the bearer, bearer documents or money transfers.
- Example 5 The task entails cashing cheques at the customer's request.
- Example 6 The professional receives money from the customer with the request to pay this money to a third party, while there are no documents verified by the professional which legitimise the payment.

Example 7 Payment by an (unknown) third party or a transfer of money if the identity of the account holder, the beneficiary of the account, and/or the future investor (on whose behalf the money is paid) are not the same person.

Example 8 A loan for which security is obtained from a foreign (legal) person, while the relationship with the customer is not clear.

F. Unusual transactions with regard to legal entities and structures

Example 1 The customer uses or wishes to make use of one or more intermediary, foreign or purchased legal persons or companies, – while there are no – or do not appear to be any – legitimate fiscal, legal or commercial reasons for this.

Example 2 The customer wishes to establish different legal persons or companies on behalf of another person in a short space of time, while there are no – or do not appear to be any – legitimate fiscal, legal or commercial reasons for this.

Example 3 The customer wishes to establish or take over a legal person or company with an (envisaged) dubious objective, or an objective which does not appear to be related to his normal professional or business practice or other activities, or with an objective for which a licence is required while the customer has no intention of obtaining such a licence, and there is no explanation for this which is acceptable to the professional.

Example 4 The customer wishes to transfer or obtain shares in a legal person or company which was established less than one year before in such a way that this directly or indirectly results in a change in the control of the company, as referred to in the S.E.R. decision on the 2000 Code of Conduct for Mergers (irrespective of whether this decision applies to the legal act), while the person who would acquire the control as a result, or the customer himself, refuses to inform the Minister of Justice about his antecedents by submitting questionnaires (or having them submitted) as though he had established the company.

Example 5 The customer makes use of legal persons or companies with a control structure which is not transparent or with a character or organization which is suitable for concealing the identity of the underlying interested party (e.g., shares to the bearer, trusts, companies which are not transparent), while there is no explanation for this which is acceptable to the professional.

Example 6 The frequent change of legal structures and/or the frequent change of managers of legal persons or companies. A complex legal

structure is involved which does not appear to serve a realistic purpose.

Example 7 Legal persons or companies which are in the process of being established for a long time.

G. Unusual transactions with regard to property and other registered properties

Example 1 Transactions related to a registered property, financed by means of a (mortgage) loan, of which the amount differs significantly (upwards or downwards) from the consideration to be paid in return, while there is no explanation for this which is acceptable to the professional.

Example 2 The properties are or have been sold several times in a short period of time with unusually high profit margins, while there is no explanation for this which is acceptable to the professional.

Specific guidelines per professional group

In addition to the above-mentioned guidelines, a number of – probably self-evident – guidelines follow below for particular professional groups.

H. Independent legal advisors, lawyers

Example 1 There are reasons to have doubts about the origins of or the legal basis under which money is made available to companies managed by the advisor. The customer or intermediary is not prepared to provide information about the origin or the legal basis of the money, or is only prepared to do so after a great deal of insistence.

I. Civil-law notaries

Example 1 The customer is not resident or employed in the territory of the civil-law notary concerned and does not belong to the circle of customers of the civil-law notary concerned, makes use of an intermediary who is not known to the civil-law notary concerned, or uses the civil-law notary concerned for a service for which a civil-law notary from the customer's own region could also have been used, while there is no explanation for this which is acceptable to the civil-law notary.

J. Tax advisors, auditors in public practice, accountants, business economic advisors

- Example 1 A transaction involving a customer leads to a result which is clearly higher or lower than could reasonably be expected, or to an unusually high result, compared to comparable companies in the sector in which the customer is active, in particular if the turnover consists to a significant extent of cash sales.
- Example 2 There is an inexplicable discrepancy between money and the flow of goods. A customer achieves unusually high turnovers and/or profits and it is not clear to which activities these are related.
- Example 3 A transaction involving a customer takes place under clearly poorer conditions than could reasonably be expected, while there is no acceptable explanation for not opting for a better structure.
- Example 4 The actual picture of the annual account does not correspond to the relevant documents. Unauthorised transactions or incorrectly recorded transactions. Accounting systems, which by design or deliberately do not provide an adequate possibility of following up transactions or providing sufficient evidence.
- Example 5 Payments for services provided which seem excessive in relation to the services that were provided. Commissions, etc., which seem excessive; payments for services which were not specified, or loans to advisors, related parties, employees or government personnel.
- Example 6 No obligations on publication are met and the legal obligation to obtain an accountant's declaration with the annual account, if this applies, is not met.
- Example 7 Atypical advance payments of insurance premiums.
- Example 8 Insurance policies with premiums which appear to exceed the purchaser's means.
- Example 9 Insurance policies with values which do not appear to correspond to the purchaser's needs.

K. Agents and brokers in properties

- Example 1 The property is not situated in the territory of the agent or the broker.
- Example 2 The commission is paid in cash.

- Example 3 In the context of commissioning the professional to mediate in the sale or purchase, the customer asks him to make a valuation which is disproportionate to the value of the property.
- Example 4 The customer requests a sum for the mortgage where there is an unusually large difference between the sum that was borrowed and the purchase sum, or the value of the property, while no acceptable explanation can be given for this.