

By e-mail: FATF.Publicconsultation@fatf-gafi.org
Financial Action Task Force

Den Haag, 20 augustus 2021
dossiernummer: 201468
uw kenmerk: n.v.t.
telefoonnummer: +31 (0)6 13 49 94 79
e-mail: m.zschuschen@advocatenorde.nl

Betreft: Revisions to Recommendation 24

Dear Sirs,

The FATF has published 'Revisions to Recommendation 24' for public consultation. The NOvA asked his advisory committee AML to respond on the consultation.

Hereby I send you the advice of the advisory committee. The general council agrees with the considerations of the advisory committee and requests you to involve them in the further elaboration.

Yours sincerely,
on behalf of the general council,



mw. mr. R.G. van den Berg
secretary general

attachment: advice

ADVICE

To:	the general council (algemene raad) of the Dutch Bar (Nederlandse orde van advocaten)
From:	the legislative advisory committee AML (wetgevingsadviescommissie Wwft)
Date:	20 August 2021
Re:	public consultation FATF regarding revisions to Recommendation 24, transparency and beneficial ownership of legal persons

SUMMARY

Conclusion

Revision of the FATF Recommendation 24 is necessary to relieve obliged entities and registering entities of bureaucracy that has no relevance for combatting crime and that endangers the data protection of beneficial owners.

CONSULTATION RESPONSE

Introduction

FATF has invited the public¹ to submit responses to a white paper regarding revisions to Recommendation 24, transparency and beneficial ownership of legal persons. The legislative advisory committee AML of the Dutch Bar (*wetgevingsadviescommissie Wvft van de Nederlandse orde van advocaten*), hereinafter “the Committee”, is pleased to make use of the opportunity to respond in the consultation.

Subject of the consultation are the recommendations by FATF regarding transparency and beneficial ownership (‘BO’) of legal persons. These recommendations are important for European legislation as implemented in the Netherlands. Lawyers admitted to the Bar (*advocaten*) have to deal with BO rules insofar as they have to comply with Dutch anti-money laundering (‘AML’) legislation when providing AML-relevant services. Their clients have to deal with them because of the know-your-customer (‘KYC’) obligations of other AML-obliged entities and because of the register of beneficial owners (‘BO-register’).

Currently the negative consequences of AML-legislation are becoming more and more clear, including the expensive and time consuming bureaucratic efforts that AML-obliged entities have to make, while no contribution to combating money laundering or terrorist financing is to be expected.

We would like to draw attention to the fact that we have no objection to private companies contributing to the fight against financial and economic crime. However, the obligations imposed on them must be feasible and proportionate.

¹ <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/white-paper-r24.html>

Scope

The consultation consists of sixteen questions, that follow below.

1. Should countries be required to apply measures to assess the ML² and TF³ risks to all types of legal persons created in the country and also to at least some foreign-created legal persons and take appropriate steps to manage and mitigate the risks?

[1a.] We agree that it is appropriate that measures are taken to assess the ML and TF risks in regard of all types of legal persons created in the country.

We however think that it is important that the measures are different depending on the type of legal person.

Example from the Netherlands regarding the definition of the beneficial owner: the Dutch *stichting*⁴ is used for several types of public or semi-public activities. Many of these *stichtingen* are publicly funded and publicly supervised (e.g. schools, hospitals, pension funds). It is unnecessary to determine a 'beneficial owner' with these types of *stichtingen*, as the relevant persons (the managing directors) are already registered with the trade register. Current Dutch BO-legislation (based on European legislation) does not provide for exceptions. The same applies to *verenigingen* (associations), that in most cases have no beneficial owners.

To our opinion the current European practice of including in the BO-register persons who are formally responsible for the management (the managing directors (*statutair directeuren*) of legal entities) is superfluous when such directors have no economic interest in the entity they manage (other than salary or management fee). The formal position of functionaries should be registered in the trade register. Countries should concentrate on accurate trade registers and land registers instead of making the BO-register a shadow trade register.

The differences between types of legal entities should also have other consequences in regard of the assessment of ML/TF risks, e.g. in the non-profit should be taken into consideration the supervisory systems already in place (e.g. schools, medical institutions, legal entities fulfilling public tasks like the central bank and the markets authority). Currently the ML/TF measures are too much based on incidents observed by investigating authorities. It is important to better involve specific sectors in assessing risks.

[1.b] In relation to foreign-created legal persons, reasonable measures are necessary, taking into consideration the legal environment. Example: countries in the European Union (EU) should only consider measures concerning entities from countries outside the EU, when there is a relevant relationship with a EU-country, see question 2.

2. What constitutes a sufficient link with the country? How should countries determine which foreign-created legal persons have a sufficient link with the country? Is there an alternative standard to "sufficient link" that could be used? What are the practical issues met/envisaged regarding the identification and risk assessment of foreign created legal persons?

² Money laundering.

³ Terrorist financing.

⁴ Often translated as 'foundation' but please note it has nothing to do with the Anglo-Saxon foundation.

[2a.] Of course ML and TF measures of countries may include registration of foreign entities. That will facilitate identification. It should apply to foreign entities that have a sufficient link with a country, taking into consideration the systems already in place. Currently in Europe there are already systems obliging **foreign entities (from other European countries and from outside the EU) to register themselves with a national trade register**, thus providing information that is relevant for AML-obliged entities.

Example of existing registration duties:
in the Netherlands it is the case with:

- Formally foreign entities (*formeel buitenlandse rechtspersonen*)⁵, i.e. a capital company incorporated under a law other than Dutch law, having legal personality, which carries out its activities wholly or almost wholly in the Netherlands and which has no real connection with the state in which the law of which it is formed applies. The legislation does not apply to companies governed by the law of one of the Member States of the European Union or of a State party to the Agreement on the European Economic Area of 2 May 1992.
- An enterprise belonging to a foreign legal person that has a main or a secondary establishment in the Netherlands.
- Foreign legal persons that make labour available in return for payment ("*arbeidskrachten ter beschikking stellen tegen betaling*").

These types of companies have to provide information to the trade register based on a relevant link with the country, that also may be relevant for ML/TF measures.

Recommendation:

look at the existing registration duties of foreign entities and see if the information provided by the entities is sufficient. Don't create new systems, instead improve current systems.

[2b.] In regard to identification of foreign entities it may be helpful to add a duty of **registration in the trade register** of foreign entities that have relevance for a country other than mentioned above (like the formally foreign entity and entities with branches in a country). It should be practical and relevant for mitigating ML and TF risks, e.g.

- Ownership of real estate in a country.
- Ownership of other relevant assets.

To prevent unnecessary bureaucratic efforts thresholds may be necessary.

[2c.] Your last question is: "*What are the practical issues met/envisaged regarding the identification and risk assessment of foreign created legal persons?*".

Verification of the identity might be a problem but is mitigated when such an entity is registered with the local trade register, see answers 2a and 2c.

The risk assessment of these entities may be very difficult in practice, especially when it regards entities from far away countries. We do not see what the possibilities of countries are to improve the assessment of risks of foreign created legal persons. That is a matter of the information

⁵ <https://wetten.overheid.nl/BWBR0009191>

available regarding the legal persons, that may differ from country to country and may also differ between several types of activities.

[2d.] Final remark: **legal systems** in each country play an important role in the prevention of ML and TF. Currently too much emphasis is on creating extra layers above the existing legal systems. It is a big mistake that creating new systems are relevant for the fight against crime. Those new systems instead create uncertainty and a lot of bureaucracy. FATF should promote improvement of current systems.

Examples:

- In countries that do not have good working land registers, there is a lot of uncertainty who is the real owner of property. So it is important to create land registers and a clear system of transferring of real estate in countries that do not have these systems.
- There are also countries without well-established trade registers with accurate information on enterprises and legal entities. First improve that, before creating new registers.
- The formalities around the transfer of assets may differ from country to country. Example: the Netherlands is one of the few countries in Europe where for the transfer of shares of limited liability companies (*besloten vennootschappen*) a civil law notary is necessary, thus creating complete clarity on the ownership of shares. So first promote the improvement of the legislation regarding the transfer of assets and proof of ownership.
- Look at the information registered with trade registers. E.g.: when it is possible in a country that a corporate entity is managing director of a legal entity, add an obligation to provide information who is the director of the managing director.

3. (a) What do you see as the key benefits and disadvantages of a BO registry, and (b) what are the alternative approaches to registries, such as BO information held by companies, FIs, and DNFBPs, and their key benefits and disadvantages?

[3a] To our opinion the BO registry has **no benefits**. The registry is not relevant for AML-obliged entities in the EU (and NL), as obliged entities may not rely on the registry.

In the Netherlands the BO-register has no additional value for the authorities (as the Dutch Tax Authority has explained during the preparation of the Dutch legislation).

It has no value for the public either, because they lack the expertise to assess the information. The same applies to journalists and NGOs that are claiming to fight money laundering. Fighting money laundering should be reserved for specialised authorities and entities.

[3b] The disadvantages of the BO-registry are major:

- AML-obliged entities in the EU may not rely on the register.
- Legally the BO-concept is complicated and leading to a lot of unnecessary discussions. In the EU parties without sufficient legal knowledge have to assess the BO-information, like employees of the authority holding the BO-registry (in the Netherlands the Kamer van Koophandel) and compliance employees of financial institutions.
- Very often managing directors without an economic interest are registered as beneficial owners (according to the EU-rule that every entity should have a beneficial owner), see also answer 1a.
- The bureaucratic efforts related to the register are not proportional, this applies both to those who have to register their BO-information (the registering entities) and the AML-obliged entities that have to verify the correctness of the BO-registration under EU-law.

- In terms of data protection the BO-registry obligations are leading to disproportional risks for the beneficial owners, as their details are registered with many parties⁶ leading to major cybersecurity and privacy risks for the beneficial owners. These risks will become unmanageable for these owners.
- It is very expensive; the expenses are disproportionate.

Solutions to our opinion:

- Simplify the BO-definition. Exclude managing directors that have no economic interest.⁷
- Place the BO-registration with a specialised party, like the tax authorities (who due to their role already have most of the information).
- Limit the obligations of AML-obliged entities in regard of group structure and BO and other specialised activities to those type of companies that have the relevant expertise. Let financial experts (accountants, tax advisors) look at financial information, ask lawyers (as far as AML/CFT legislation applies to them) for legal information within the boundaries of their client monitoring obligations under AML/CFT law , [4] ask banks to monitor transactions. One of the most important disadvantages of current AML-legislation in the EU that all types of obliged entities are supposed to have the same information position and the same expertise. That is not true.
- Protect the personal data of the beneficial owners by making it possible that only an entity high in the group, or the beneficial owner him/herself provides the necessary confidential information.

So:

- No extensive group information and BO-information with the registering entities.
- No general obligations for DNFBPs (other than verifying the identity of the client and its representants). Only relevant obligations for those DNFBPs that have relevant expertise.
- Obligations for FIs in relation the BO registry that are feasible and for which they have the expertise.

4. What are the key attributes and role regulators play in ensuring that a BO registry has adequate, accurate and up-to-date BO information available for competent authorities? Does this make a difference if BO information is held by a BO registry and alternative approaches to registries (e.g. BO information held by companies, Fis, and DNFBPs))?

[4a] We are of the opinion that the tax authorities should register BO information, see answer on question 3. It is useless to ask for shadow registrations at Fis and DNFBPs.

[4b] The tax authorities have the best information position and are able to see if there are reasons to ask for clarification, if necessary from certain AML-obliged entities.

5. How should the accuracy of BO information disclosed to the BO Registry be confirmed?

[5] See our answers to questions 3 and 4.

⁶ All registering entities, the AML-obliged entities, the BO-register and – if the BO-register is public – with the persons who have obtained the BO-information from the register.

⁷ Other than salary or management fee.

6. What role should the private sector play, if any, in ensuring that the BO information is adequate, accurate and up-to-date? What lessons should be learned from private sector use of existing registries?

[6] In the Netherlands we have learned that the current systems in regard of BO are expensive, need a lot of bureaucratic effort, while no relevance for detecting ML or TF is to be expected. We support improvement of the trade registers and land registers, see answer to questions 1 and 2.

7. What effective mechanisms (aside from a BO registry) would achieve the objective of having adequate, accurate and up-to-date BO information for competent authorities? What conditions need to be in place for authorities to rely on financial institutions and DNFBPs to hold BO information? How could BO information held by obliged entities as part of their CDD be utilised in this regard?

[7] See our answers to questions 2, 3 and 4.

8. How can the compliance burden on low risk companies be reduced, without creating loopholes that could be exploited by criminals?

[8] By completely overhauling the AML- and TF-concepts, by amending the BO-registration system as explained above and by improving legal systems.

9. Who should play a role in the verification of BO information? How effective is the framework on discrepancy reporting? What are the possible verification approaches that can balance the need for accuracy and compliance cost?

[9] As explained the costs and the compliance burden are disproportionate. It makes no sense to oblige companies to carry out activities for which they do not have the knowledge and expertise.

10. Should BO registries (where they exist) follow a risk-based approach to verifying of BO information?

[10] A risk based approach is the basis for any legal activity. Good legislation starts with clear and simple systems that take into account the knowledge and expertise of those who have to comply with it. One-size-fits-all is a characteristic of the current AML-legislation and should change.

11. How frequently should disclosed BO information be updated or re-confirmed (e.g. annually, within a set period after a change is made)?

[11] The tax authorities when they are registering BO-information are in a good position to assess the frequency. There is no reason for a certain period (like annually) when the tax authorities are regularly receiving information through their own channels (like tax returns). For obliged entities this depends on their AML/CFT duties, the type of business activity and this risks attached to types of customers. No general answer is possible.

12. Should access to a BO registry or another mechanism be extended beyond national (AML/CFT) competent authorities (e.g. to AML/CFT obliged entities such as financial institutions and/or DNFBPs)?

[12] Access to the BO registry should be limited to the relevant competent authorities and to a limited number AML-obliged entities when it is relevant for their activities. There is no reason to grant access to all FIs or DNFBPs for all information.

13. What measures should be taken to address concerns relating to privacy, security and potential misuse of BO information, arising from access to BO information?

[13] See the answer to question 3: currently the confidential BO-information is distributed over many parties, making it impossible for the beneficial owner to manage the risks. As explained we think the whole system has to be changed.

14. Should issuance of new physical bearer shares without any traceability be prohibited?

[14] Yes. This is already the case in the Netherlands.

15. Should existing physical bearer shares be immobilised or converted?

[15] Yes, according to transitional law, in relation to prohibition of bearer shares.

16. With regard to nominee arrangements, what are the benefits and disadvantages of requesting nominees directors and stakeholders to declare their status? Are there alternative equivalent measures that would offer the same level of transparency?

[16a] In the FATF recommendations the concept of 'nominee arrangements' has no definition. Such a definition is necessary if consequences are drawn. We found a definition in another FATF-document⁸:

Nominee arrangements

227. A nominee director is a person who has been appointed to the Board of Directors of the legal person who represents the interests and acts in accordance with instructions issued by another person, usually the beneficial owner.

228. A nominee shareholder is a natural or legal person who is officially recorded in the register of members and shareholders of a company as the holder of a certain number of specified shares, which are held on behalf of another person who is the beneficial owner. The shares may be held on trust or through a custodial agreement.

[16b] Please note that a managing director under Dutch law may not only represent the interests of another person and may not only act in accordance with instructions issued by another person. A managing director should take into consideration the interests of the entity and its stakeholders (including e.g. the tax authorities) and is liable for mismanagement. Under Dutch law there are no nominee directors; if a director is not observing his/her obligations under Dutch law, it will lead to liability.⁹ In legal systems where directors are allowed to follow instructions, it is advisable to amend the rules in regard of managing directors.

The concept of the nominee director to our opinion is unnecessary in our law system.

⁸ <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Legal-Professionals.pdf>

⁹ As in this Curaçao case, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:OGEAC:2021:91>, it is the same under Dutch law.

[16c] The nominee shareholder is only relevant for legal systems with the trust (in the Netherlands there is no legal form 'trust') or a 'custodial agreement'. We have no idea what a 'custodial agreement' is, so this form should be explained. Please note that the Dutch system of certification of shares (*certificering van aandelen*) is not a custodial agreement. It is a common system to separate voting rights from economic claims, to enable better governance of the company.

Relationship to other legislative proposals

The FATF recommendations are important for European AML- and CFT-legislation. We provide these comments hoping for improvement in the AML- and CFT-legislation.

Administrative burdens/obligations

The current administrative burden is high, both for AML-obliged entities and registering entities. It is important that the legislation is revised in order to improve the practicability and effectiveness.

Conclusion

We recommend a full revision of the BO-legislation.

ANNEX – THE CONSULTATION DOCUMENT

Source: <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html>

Revisions to Recommendation 24 - White Paper for Public Consultation

White Paper R.24 Public Consultation

[Download pdf \(211kb\)](#)

The Financial Action Task Force (FATF) is considering potential amendments to Recommendation 24 on the transparency and beneficial ownership (BO) of legal persons. The FATF's objective is to strengthen the international standard on beneficial ownership of legal persons so as to ensure greater transparency about the ultimate ownership and control of legal persons, providing competent authorities timely access to adequate, accurate and up-to-date beneficial ownership information, and to take more effective action to mitigate the risks of misuse.

The FATF is considering a number of potential changes to Recommendation 24, including the potential for updates in the areas set out below. FATF's work in this area is ongoing, and will benefit from hearing views from stakeholders, including companies and other legal persons, financial institutions, designated non-financial businesses and professions (DNFBPs), and non-profit organisations. In this consultation, the FATF is particularly interested in learning the views of companies and other legal persons, as many of the changes currently under consideration may impact them. The FATF would also welcome comments and data from countries with registries, as well as countries using alternative mechanisms. The FATF would welcome comments on all these proposals and in particular on the questions highlighted below:

- **Risk-based approach for foreign legal persons** - In light of the use of cross-border ownership structures to conceal beneficial ownership, FATF is considering whether all countries should apply measures to understand the risk posed by all types of legal person created in the country (as currently required) and also to certain foreign-created legal persons, and to take appropriate steps to manage and mitigate these risks. To manage the task regarding foreign-created legal persons which countries should understand and mitigate the risk, FATF is considering to limit the scope to foreign-registered legal persons which have sufficient links with the countries.
 1. *Should countries be required to apply measures to assess the ML and TF risks to all types of legal persons created in the country and also to at least some foreign-created legal persons and take appropriate steps to manage and mitigate the risks?*
 2. *What constitutes a sufficient link with the country? How should countries determine which foreign-created legal persons have a sufficient link with the country? Is there an alternative standard to "sufficient link" that could be used? What are the practical issues met/envisaged regarding the identification and risk assessment of foreign created legal persons?*

- **Multipronged approach to collection of Beneficial Ownership information** - The FATF recommends that countries use a multi-pronged approach to ensure that beneficial ownership information is available to competent authorities. FATF is evaluating countries' experience to date of the creation and operation of beneficial ownership registries, and is considering what core elements should be included in a multi-pronged approach, and what supplementary measures should be considered for inclusion. This includes the benefits to law enforcement and other competent authorities of registries and other approaches, the costs and compliance burden associated with beneficial ownership registries to governments and companies; the value of information; the risks around the introduction of registries and other approaches, and other requirements and challenges for each of these approaches to be successful.

3. (a) What do you see as the key benefits and disadvantages of a BO registry, and (b) what are the alternative approaches to registries, such as BO information held by companies, FIs, and DNFBPs, and their key benefits and disadvantages?

4. What are the key attributes and role regulators play in ensuring that a BO registry has adequate, accurate and up-to-date BO information available for competent authorities? Does this make a difference if BO information is held by a BO registry and alternative approaches to registries (e.g. BO information held by companies, FIs, and DNFBPs)?

5. How should the accuracy of BO information disclosed to the BO Registry be confirmed?

6. What role should the private sector play, if any, in ensuring that the BO information is adequate, accurate and up-to-date? What lessons should be learned from private sector use of existing registries?

7. What effective mechanisms (aside from a BO registry) would achieve the objective of having adequate, accurate and up-to-date BO information for competent authorities? What conditions need to be in place for authorities to rely on financial institutions and DNFBPs to hold BO information? How could BO information held by obliged entities as part of their CDD be utilised in this regard?

8. How can the compliance burden on low risk companies be reduced, without creating loopholes that could be exploited by criminals?

- **Adequate, accurate, and up-to-date information** - FATF is considering how to clarify the key attributes of access to information by competent authorities, that access should be timely, and information should be adequate (to identify the beneficial owner's identity and means of ownership), accurate (i.e. verified using documents or other methods, on a risk-sensitive basis) and up-to-date (i.e. updated within a certain period following any changes).

9. Who should play a role in the verification of BO information? How effective is the framework on discrepancy reporting? What are the possible verification approaches that can balance the need for accuracy and compliance cost?

10. Should BO registries (where they exist) follow a risk-based approach to verifying of BO information?

11. How frequently should disclosed BO information be updated or re-confirmed (e.g. annually, within a set period after a change is made)?

- **Access to information** - FATF is considering who should have access to beneficial ownership information, whether held by a registry or another mechanism., and how confidentiality or privacy should be protected.

12. Should access to a BO registry or another mechanism be extended beyond national (AML/CFT) competent authorities (e.g. to AML/CFT obliged entities such as financial institutions and/or DNFBPs)?

13. What measures should be taken to address concerns relating to privacy, security and potential misuse of BO information, arising from access to BO information?

- **Bearer Shares and Nominee arrangements** - FATF is considering possible measures to strengthen controls on bearer shares and nominees to prevent them from being used to conceal the beneficial owners of legal persons. This includes potential prohibition on the issuance of new physical bearer shares and a requirement for existing physical bearer shares to be immobilised or converted before any associated rights can be exercised. FATF is also considering requiring nominee directors and shareholders to proactively declare their status and (for non-regulated nominees) their nominator to the company and to a registry or financial institution.

14. Should issuance of new physical bearer shares without any traceability be prohibited?

15. Should existing physical bearer shares be immobilised or converted?

16. With regard to nominee arrangements, what are the benefits and disadvantages of requesting nominees directors and stakeholders to declare their status? Are there alternative equivalent measures that would offer the same level of transparency?

Please provide your response, including any drafting proposals to FATF.Publicconsultation@fatf-gafi.org with the subject-line "Comments of [author] on the draft Amendments to Recommendation 24", by 20 August 2021 (18h00 CET).

While submitting your response, please indicate the name of your organisation, the nature of your business, and your contact details. We will use your contact information only for the purpose of this public consultation and for further engagement with you on this issue. The FATF will not share this information with third parties without your consent.

At this stage, the FATF has not approved any draft amendments to R.24. The FATF will consider the views received and propose revisions to the text of R.24 for discussions at its October 2021 meetings.

We thank you for your kind contribution.