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# **EXAMPLES OF EXPERIENCES FROM MSs IN TRANSPOSING THE 4<sup>TH</sup> AML DIRECTIVE & CROSS-CUTTING ISSUES RE: AML/CFT IN THE NEGOTIATING CHAPTERS**

**Prof. Dr. Pavlos E. Masouros, LL.M. (Harvard)**



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- Key Points in the 4<sup>th</sup> AML Directive: Beneficial Ownership and the UBO Register
- The Typology of Beneficial Ownership around the World
- Examples of experiences from MSs in transposing the 4<sup>th</sup> AML Directive
- Cross-cutting Issues re: AML/CFT in other Negotiating Chapters



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## Ultimate Beneficial Ownership (UBO) Register

Art. 30 (2015/849/EU):

*“1. Member States shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, and current information on their **beneficial ownership, including the details of the beneficial interests held.** [...]*

*3. Member States shall ensure that the information referred to in paragraph 1 is held in a central register in each Member State, for example a **commercial register, companies register** [...] **or a public register.** [...]*



## Ultimate Beneficial Ownership (UBO) Register

Art. 30 (2015/849/EU):

*“5. Member States shall ensure that the information on the beneficial ownership is accessible in all cases to:*

- (a) Competent authorities and FIUs, without any restriction;*
- (b) Obligated entities, within the framework of customer due diligence [...];*
- (c) Any person or organization that can demonstrate a legitimate interest.*

*The persons or organisations referred to in point (c) shall access at least **the name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held.***



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## Ultimate Beneficial Ownership (UBO) Register

Art. 30 (2015/849/EU):

*“9. Member States may provide for an exemption to the access [...] of the information on the beneficial ownership on a case-by-case basis in exceptional circumstances, where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation, or where the beneficial owner is a minor or otherwise incapable. Exemptions [...] shall not apply to the credit institutions and financial institutions and to [...] public officials.”*



## “Beneficial Owner”: The Definition

Art. 3 (6) (2015/849/EU):

“ [...] (a) in the case of corporate entities:

(i) *the natural person(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the **shares or voting rights or ownership interest** in that entity, including through bearer shareholdings [...] **other than a company listed on a regulated market** that is subject to disclosure requirements consistent with Union law or subject to equivalent international standards which ensure adequate transparency of ownership information*

*A shareholding of **25% plus one share** or an ownership interest of more than 25% [...] shall be an indication of direct ownership. A shareholding of 25% plus one share or an ownership interest of more than 25% [...] held by a corporate entity, which is under the control of a natural person(s), or by multiple corporate entities, which are under the control of the same natural person(s), shall be an indication of indirect ownership.*



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## “Beneficial Owner”: The Definition

Proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (COM(2016)0450 – C8-0265/2016 –

2016/0208(COD)):

*The threshold for the determination of beneficial owners should be lowered from 25% to **10% (plus one share)***



## “Beneficial Owner”: The Definition

Article 3(6) (2015/849/EU):

“ (b) *in the case of trusts:*

(i) *the settlor;*

(ii) *the trustee(s);*

(iii) *the protector, if any;*

(iv) *The beneficiaries, or where the individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates;*

e.g. benami schemes

(c) *In the case of legal entities such as **foundations**, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those referred to in point (b);*





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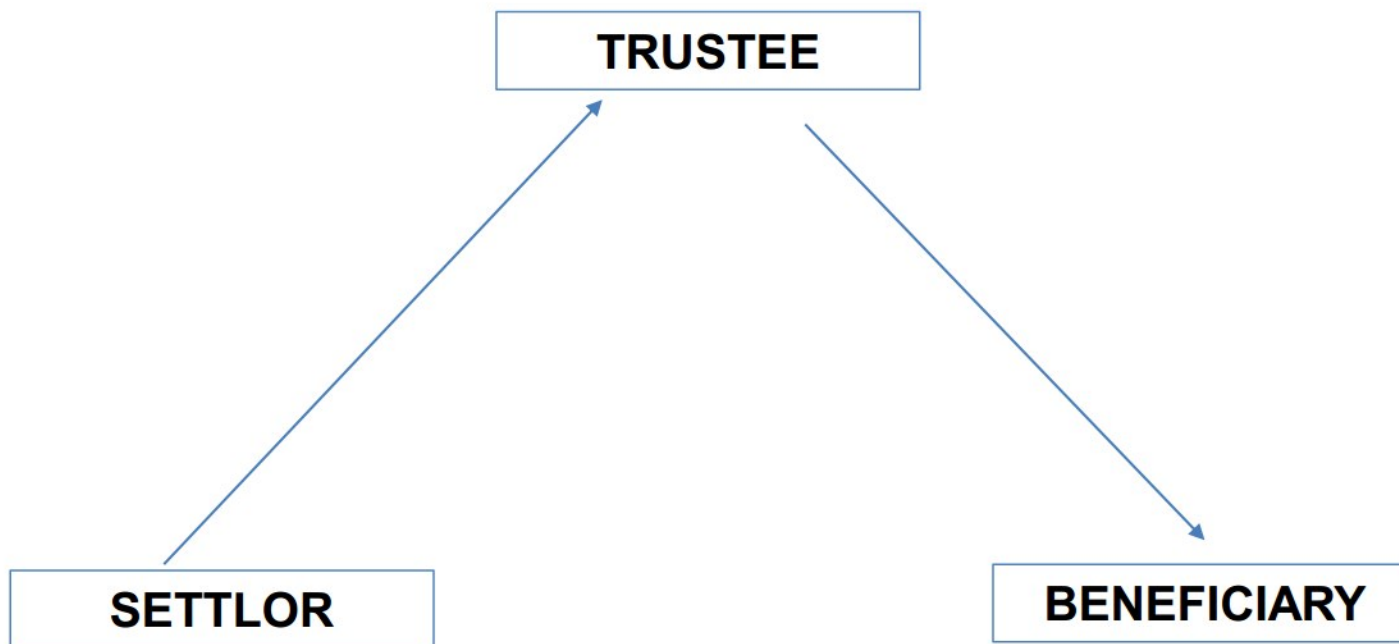
# The Typology of Beneficial Ownership

- Trusts
- Call option agreements
- Shareholders' agreements (vote buying)
- Foundations
- Nominee Shareholder Services



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# Trusts



If identity of the beneficiary is unknown (e.g. beneficiaries is a specified group of individuals, e.g. employees), then Israeli AML regulation could help: identify the reason why beneficiary is unknown + pledge to disclose upon finding out.



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## Call Option Agreements

- Prevalent in common law jurisdictions
- UBO signs agreement with registered shareholder, by which against a quarterly fee the UBO acquires the option to acquire the shares at any time.
- To secure the effectiveness of the call option a transfer deed in relation to the shares is already signed between UBO (or a person nominated by the UBO) and shareholder and is left undated.
- The transfer deed and the shares are put in custody, under a custody agreement, with a custodian who, upon the UBO exercising the call option, awaits for the UBO's instructions to date the deed and deliver the shares to him.



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## Call Option Agreements

- Does the option make one a UBO in the meaning of the 4<sup>th</sup> AML Directive?
- Should the option holder appear in the UBO register?
- Only if during the duration of the call option agreement he is entitled to issue voting instructions to the registered shareholder.



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## Shareholders' Agreements

- Shareholders' or relationship agreements often mask vote buying
- A new investor bails out a failing company (either through an equity injection or otherwise) and agrees with existing shareholders to control their votes going forward
- Controlling the voting right makes him the UBO



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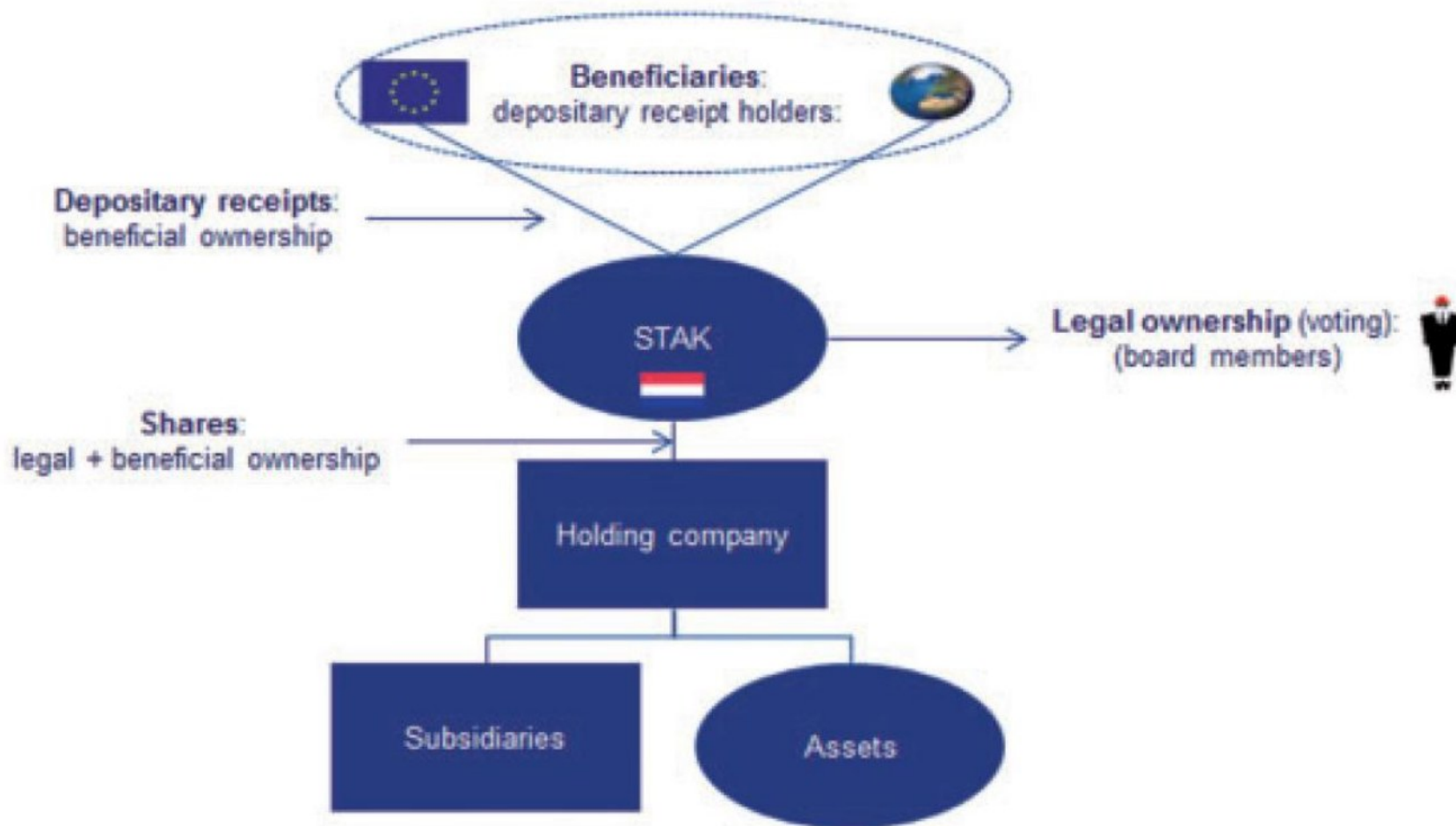


## Foundations

- Most prevalent in the Netherlands (*STAK*) and Liechtenstein (*Stiftung*)
- Established with notarial deed
- Requires a director and issues depositary receipts (bearer instruments) to beneficiaries under the so-called ‘Trust Conditions’, which is a private agreement not filed anywhere.
- The depositary receipt incorporates an economic right, but no governance right. The holder’s claims are secured by statutory pledge over the STAK’s assets.



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# Nominee Shareholder Agreements

- Prevalent in civil law jurisdictions, but also offshore jurisdictions like Cyprus and Dubai.
- Replicates the trust structure, but fitting the arrangement in the institutions of civil law (principal-nominee).
- Nominee agreements are currently not filed in registries
- The UBO should be identified as the beneficial owner under the 4<sup>th</sup> AML Directive.





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# UBO Register: The Netherlands

## Which entities need to register?

- Companies and legal entities established in The Netherlands and legal entities with a registered office in The Netherlands need to register UBO information in line with the entities that have to register at the Chamber of Commerce.
- **Not complying with the requirement will be seen as an economic crime.**

## Where to register and how is access controlled?

- The Chamber of Commerce shall be appointed as the registrar of UBO information. The Netherlands chose for a public register allowing, in principle, everyone to access the basic information set if the party requiring access is registered and pays a small fee. Certain authorities will have access to a bigger set of data.



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# UBO Register: The Netherlands

## Which information is to be filed?

- The Dutch Bill follows the EU 4<sup>th</sup> AML directive and the following information will be made public:
- Name;
- Month of birth
- Year of birth
- Nationality
- Country of residence
- Nature and extent of the beneficial interest held.

## The following information is required to be filed, but will only be made available to specific authorities:

- Name, Date of birth, place of birth and country of birth
- Address
- If possible, the Citizen Service Number (BSN) and/or foreign tax identification number
- Copy of the document verifying the identity of the shareholder
- The exact size of the (economic) interest of the UBO
- Documentation substantiating why a person has the status of UBO and the size of the corresponding (economic) interest.



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# Central Register of Shareholders: The Netherlands

- The CRS will record information about shares and the shareholders of private limited liability companies and non-listed public limited companies. The CRS will be filled in with information provided by notaries and will be held at the Royal Notarial Association.
- Only specific (government) services will be permitted to access the information.
- Various elements of the law require the mandatory intervention of a notary in respect of transactions related to registered shares, for example, the issue or transfer of shares and the establishment of a usufruct or a pledge on registered shares.
- The elements known to a notary shall be featured in the CRS. This concerns the details of the shareholder, but also the details of usufructuaries and pledgees of registered shares, given that this may involve the transfer of voting rights in or the ownership of the underlying shares. The bill does not contain any thresholds for distinguishing whether a specific interest held should or should not be registered: minority shareholdings will also be recorded in the CRS.
- The intervention of a notary is not mandatory in the case of issued or transferred shares that are not registered shares but bearer shares. Therefore, information on such shares will not be recorded in the CRS. Nor is the intervention of a notary mandatory for the issue of **depository receipts and information about depository receipt holders will also not have to be recorded in the CRS.**



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## Depository Receipts

- Very common in the Netherlands
- They decouple control from economic interest
- All major Dutch corporations have Foundations as registered shareholders and the real owners only hold depository receipts (without voting rights)
- Depository receipt holders should now be registered in the UBO; but it's going to be challenging in practice as they are bearer instruments changing hands easily and rapidly.
- The limitations of the UBO Register is that it doesn't reconcile with the exigencies of trading.in securities.



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## The UBO Register: Ireland

- If the Relevant Entity either cannot identify an individual who is a beneficial owner, or identifies an individual who may be a beneficial owner, but cannot be certain of this, the Relevant Entity must instead list its “senior managing officials” (i.e. its directors and CEO) in its Register as being its beneficial owners.
- How that information will be passed by Relevant Entities to the operator(s) of the Central Register remains to be seen, and it has not yet been confirmed who will operate the Central Register. The set-up and operation of centralised registers, together with the preparation of related guidelines, can be a lengthy process (as has been the case with the Central Credit Register)
- So Ireland has essentially opted for a UBO Register first at the company level and then at a central level.



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## The Trusts Register: Italy

- As part of Italy's domestic legislation implementing the EU IV Anti Money Laundering Directive of 2015 (EU 2015/849), the legislative decree provides that trusts with tax effects in Italy must be registered in a specific section of the Register of Enterprises.
- The Register of Enterprises is a public register in which all incorporated and unincorporated business entities and individual commercial enterprises are registered and file their initial organizational documents, annual financial statements, list of owners or shareholders, and changes to their organization and structure.
- The Register of Enterprises will have a new section specifically for trusts pursuant to the new anti money laundering legislation.
- Access to the Register's trust section shall be limited to the tax agency and anti money laundering authorities (while the Register's information on business entities and enterprises are available to the public).
- Italy does not have any law on trusts. Trusts organized under foreign (non Italian) law are recognized and have legal effects in Italy pursuant to the provisions of the Hague Convention on Trusts.



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## UBO Register: Italy

- The bill is going to enter into force after receiving a favorable opinion by the Italian Data Protection Supervisor





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# ‘Legitimate Interest’: Slovenia

- The legitimate interest exists, when the familiarization with the information requested has direct impact on the protection, at law or regulation or the rights of the harness the benefits of that person or entity, or its legal position.
- However, if the Register is open to all obliged entities for CDD purposes (incl. lawyers), one can always instruct a lawyer to check.



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# Fragmentation in the transposition of the 4<sup>th</sup> AML Directive

- EU Commission made comments to Serbia's AML draft bill; one of the comments was that it leaves the introduction of the UBO register for other laws.
- Serbia is not a unique case in this respect; many MSs have transposed the 4<sup>th</sup> AML Directive while leaving the introduction of the UBO register for later/other laws.
- Austria, Belgium.



## AML and the Market Abuse Directive: Chapter 9 (Financial Services)

- The Market Abuse Directive (MAD) makes the “aiding and abetting” of market abuse a criminal offence.
- This may argue for more thorough investigation of beneficial ownership in regulated companies (which rest outside the 4<sup>th</sup> AML Directive scope).
- A custodian or a market infrastructure (e.g. omnibus accounts, CSD, segregated account) should have known that market abuse was taking place, and could therefore face criminal charges.



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# The Clearstream case: Central Bank of Iran UBO in US securities through a European custodian

- Clearstream Banking S.A., a Luxembourg entity. Acted as a custodian for investing in US securities through omnibus accounts.
- Clearstream held interests in 26 corporate and sovereign bonds in its omnibus account at a U.S. financial institution in New York in which the CBI had a beneficial ownership interest, with a total nominal value of \$2.813 billion.
- Central securities depositories in the United States served as the ultimate place of safekeeping for these securities. 5. Clearstream, as intermediary, exported custody and related services from the United States to the CBI with respect to the 26 securities described above.
- Clearstream served as the channel through which the CBI was able to hold an interest in these securities, as well as to transfer or sell those interests at a later date.



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# The UBO Register and the 1<sup>st</sup> Company Law Directive: Chapter 6 (Company Law)

- The conditions under which access to information on beneficial ownership is granted shall have to be redefined, and clear access rules should be established through an amendment to the 1<sup>st</sup> Company Law Directive (Directive 2009/101/EC), the Union legal act that lays down the rules on disclosure of company documents and the validity of obligations entered into by a company.
- This is in the Commission's Proposal that also suggests changes in the 4<sup>th</sup> AML Directive.
- The UBO Register creates a slight contradiction with the 1<sup>st</sup> Company Law Directive, so changes therein are warranted.



# The 4<sup>th</sup> AML Directive and the General Data Protection Regulation (2016/679)

- The 4th AML Directive would result in increased amounts of data being collected and would thus increase the possible negative consequences for data subjects.
- AML and data protection have a symbiotic relationship
- EU citizens' right to the protection of his/her personal data is safeguarded in Article 16 of the Treaty on the Functioning of the EU and in Article 8 of the Charter of Fundamental Rights of the EU
- We should be expecting a number of complaints that shall end up in the CJEU from individuals/entities denying to be included in the UBO register



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# THANK YOU!

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