

Quoted

The Trust Offices (Supervision) Act 2018: one year later

As per 1 January 2019, the Trust Offices (Supervision) Act 2018 entered into force. The new Act has the objective to professionalize the trust sector in the Netherlands and tightens up the standards with which trust offices must comply when providing services. This Quoted discusses the main changes, including the extended scope of the Act and the more stringent client screening process. We will also examine recent developments, such as the publication of the Factsheet on the new Act and the Dutch Central Bank's Good Practices on Tax Integrity Risks.

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One year ago the new Trust Offices (Supervision) Act 2018 entered into force. It had become apparent, not least due to the revelations in the Panama Papers, that the old legal system was no longer able to mitigate the integrity risks involved in the services provided by trust offices. An important aim of the new Act is also to put the trust sector in the Netherlands on an even more professional footing. The new Act therefore tightens up the standards with which trust offices must comply and expands the supervisory instruments available to the Dutch Central Bank. This Quoted discusses the main changes, including the extended scope of the Act, regulations on improving the integrity and professionalism of trust offices, the more stringent client screening process and the enhanced supervisory and enforcement instruments. We will also examine recent developments, such as the publication of the Factsheet on the new Act and the Dutch Central Bank's Good Practices on Tax Integrity Risks. Lastly, a number of practical tips are included.

1. Introduction

The provision of trust services, such as acting as director or the use of a company to facilitate the flow-through of an international undertaking's capital, comes with an inherent integrity risk. Trust services are provided, for example, for the benefit of tax-driven structures, which by their complex nature are susceptible to abuse. In order to prevent the Dutch financial system from being abused for money laundering and terrorist financing, the trust office has what is known as a gatekeeper function. In that context, trust offices are expected to screen their clients before starting their service, in order to prevent legal entities or companies from potentially being used for money laundering, terrorist financing or other socially improper conduct.

The publication of the Panama Papers and the Paradise Papers, increased insights of the regulator, new European legislative frameworks and an inquiry by the Parliamentary Investigation Committee for tax constructions showed that the old regulation of trust offices no longer provided sufficient safeguards, giving reason to tighten up this legislation. Since the reforms are so wide-ranging, the legislator has chosen to replace the old Trust Offices (Supervision) Act from 2004 (*Wet toezicht trustkantoren*, **Wtt**) with the new Trust Offices (Supervision) Act 2018 (*Wet toezicht trustkantoren 2018*, **Wtt 2018**) with effect from 1 January 2019. Due to the nature and extent of the changes, the new rules have a significant impact on trust offices. Some provisions contained in the Act are elaborated further in the Decree on Trust Offices (Supervision) 2018 (*Besluit toezicht trustkantoren 2018*) and the Regulation on Trust Offices (Supervision) 2018 (*Regeling toezicht trustkantoren 2018*). Besides the Wtt

2018, other laws are particularly relevant to trust offices, including the Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, **Wwft**) and the Sanctions Act 1977 (*Sanctiewet 1977*). In addition, European legislation such as the fourth and fifth Anti-Money Laundering Directives (AMLD4¹ and AMLD5²) has a considerable influence on the trust sector.

2. Broadening the definition of trust services

The Wtt 2018 applies to trust offices: briefly, legal entities that provide trust services on a commercial basis. Under the old Wtt, trust services were defined as (A) acting on instructions as director or partner of a legal entity or partnership, (B) providing a postal or office address for a legal entity or partnership in combination with performing additional activities, (C) making use of a flow-through entity, (D) selling legal entities and (E) acting on instructions as a trustee of a trust or equivalent legal entity.³

As regards service B, Article 3(4) of the Wtt 2018 stipulates that carrying out work focusing on providing a postal or office address as well as carrying out additional work is prohibited. The Factsheet⁴ published by the Dutch Central Bank (*De Nederlandsche Bank*, **DCB**) on 7 October 2019 explains that separating this work in order to circumvent a licensing requirement is explicitly prohibited. A trust office separates trust services, for example, if it carries out the administration itself for a legal person and also ensures in some other manner that another service provider provides an office address or postal address to that legal person.

1 Directive (EU) 2015/849.

2 Directive (EU) 2018/843.

3 See further the definition of trust services (*trustdiensten*) in Article 1 Wtt 2018.

4 DCB Factsheet of 7 October 2019, via <https://www.toezicht.dnb.nl/2/50-237880.jsp>

A new trust service is the *ability to carry out, on instructions, general acts of management for a legal entity or company by a person outside the group*. In practice, however, this will not result in many new parties requiring a licence, since this service largely corresponds to a trust service that has been around for some time, namely the provision of management services. By making this addition, the legislator has aimed to make it impossible to circumvent the qualification as a trust office by not appointing a person as a director formally, but enabling him to carry out actual management tasks by means of a power of attorney. The explanatory memorandum to the Decree on Trust Offices (Supervision) 2018 explains that the determining criterion is that the holder of the power of attorney is in fact able to bind the legal entity for legal acts that relate to maintaining the legal entity or partnership. In its Factsheet of 7 October 2019, DCB explains that it does not matter whether the power of attorney is entered in the commercial register or whether it is a private power of attorney or one with restrictions. A power of attorney for performing separate, defined acts, such as entering into a single agreement or filing a report, does not fall under this trust service. The power of attorney must actually encompass carrying out general acts of management or be open in such a way that the authorised representative can actually conduct the general management of the legal entity or partnership.⁵

3. Licensing requirements and business operations

As part of the gatekeeper function they fulfil in the Dutch financial system, trust offices must structure their business operations in such a way that integrity risks are identified and can be mitigated. In order to strengthen the gatekeeper function, a number of additional requirements apply to trust offices under the Wtt 2018.

3.1 Obligatory legal form and two day-to-day policymakers

With a view to putting the trust sector on a firmer professional footing, the legislator imposed requirements for a trust office's legal form.⁶ Trust offices in the

Netherlands are required to have the legal form of a public limited company, private limited company or European public limited company.⁷ It is therefore no longer possible to provide trust services as a natural person, foundation or association. Not only will this benefit the professionalism of trust offices, but these legal forms will also make trust offices better able to implement the statutory requirements for ethical business operations and administrative organisation.⁸

The Wtt 2018 also imposes new requirements on day-to-day management. In order to safeguard the continuity and quality of business operations, day-to-day policy must be determined by at least two persons.⁹ The two policymakers must carry out their activities from the Netherlands.

3.2 Strengthening of the compliance function

Whereas the outsourcing of the compliance function was still explicitly permitted under the Wtt, the legislator has prohibited this in the Wtt 2018 in an attempt to improve the compliance function of trust offices.¹⁰ With an internal compliance function, the compliance officer can adopt a more proactive role and carry out his activities more effectively. The audit function, however, can be outsourced.

The Decree on Trust Offices (Supervision) 2018 elaborates on the compliance function, which must take on certain prescribed activities, including drafting a work programme each year. It also stipulates how the trust office must take account of how the function operates, in terms of the number of persons and the hours they work during the week to fulfil the compliance function.

3.3 Periodic reporting obligation to the regulator

Under the old Wtt, trust offices were only obliged to send a report to the regulator at the latter's request concerning the business operations, administrative organisation and internal monitoring. Under the Wtt 2018, the trust office must on its own initiative send to the regulator a report on its business operations once a year. The regulator may ask

5 Trust Offices (Supervision) Decree 2019 (*Besluit toezicht trustkantoren 2019*), Bulletin of Acts and Decrees 2018, 463.

6 Article 13(1) Wtt 2018.

7 Trust offices with their registered office in another member state or designated state must have legal personality in that state, and be authorised there to provide trust services.

8 Explanatory Memorandum II, 34 910, no. 3, p. 7.

9 Article 11(1) and (2) Wtt 2018.

10 Article 16(2) Wtt 2018.

the trust offices to submit reports more often if it deems such is necessary.¹¹

4. Service

The purpose of client screening is to check whether the trust office is not being abused for money laundering, terrorist financing or other conduct that should be considered socially improper. In view of the developments in this area, the results that must be achieved with this client screening have been tightened and clarified. Additional measures have also been taken for services to clients with a high-risk structure, and the independent screening of clients is stimulated through the obligatory separation of giving tax advice and providing trust services.

4.1 Extending the client screening obligations

Whereas the regulations on client screening under the old Wtt were still contained in a separate ministerial regulation, in view of their considerable importance the legislator has chosen to include these regulations in the Wtt 2018 itself. The regulations have been divided according to type of trust service, thus focusing on the specific risks and relevant parties of that particular trust service.

The client screening not only extends to the client himself, but also includes the other parties involved in the trust service, such as the object company, the ultimate beneficial owner (UBO) of the client and object company, a trust or parties who are involved in the sale of a legal entity.

What is new under the Wtt 2018 is that certain parts of the client screening come with an obligation of result. The old Wtt followed the Wwft, where 'risk-based' client screening can be performed, i.e. based on the specific risk of a particular client, business contact or trust service. The new obligation of result under the Wtt 2018 means that for a number of aspects of the client screening, a legally determined result is prescribed, both prior to and during the relationship.¹² This obligation of result, for example, applies when identifying and verifying the identity of the client and the UBO and establishing the client's ownership structure. Following the client screening, the accuracy and completeness of the result should be beyond all reasonable doubt.

When screening the object company as part of the provision of trust service A or B¹³ the obligations are as follows:

Task	Type of obligation
Integrity risk profile	Result
Transaction profile	Result
Origin of capital	Result
Financial position of the UBO	Effort
Legitimate source of capital	Effort
Registration of object company	Result
Ownership structure and formal control structure	Result
Actual control structure	Effort
Purpose of structure	Result
Origin and destination of assets	Result
Ongoing monitoring of business relationship	Effort

For those parts of the screening where the result, in view of its nature, cannot be established with complete certainty, the Act stipulates an obligation of effort. An actual effort must be made with this obligation: the facts must be established with as much certainty as possible. Depending on the type of trust service, this obligation involves, for example, establishing the actual control structure of the company. Where the formal control structure is assessed against the articles of association, for example, the actual control structure cannot always be established with total certainty as it may depend on various influences, such as the distribution of voting rights among the shareholders and contractual provisions contained elsewhere.

One example given by DCB in the Factsheet is that the financial position of the UBO cannot always be established with total certainty, not least because its assets are continually changing. It is important, however, that the trust office knows where the money is coming from, how it has been obtained, that the trust office has an indication of the total extent of that capital and that such capital has a legitimate origin. For that reason, the financial position of the ultimate beneficial owner must be established 'with certainty as far as possible'.

¹¹ Article 18(1) Wtt 2018.

¹² See also Article 23(1)(a) Wtt 2018.

¹³ Trust service (A) involves acting on instructions as director or partner of a legal entity or partnership. Trust service (B) involves providing a postal or office address for a legal entity or partnership in combination with performing additional activities.

The tightened client screening leads inevitably to the collection of more personal data by trust offices. The (European) legislation on the storing of personal data has been extended with the entry into force of the General Data Protection Regulation (GDPR).¹⁴ For this reason, the Wtt 2018 explicitly lays down that personal data may only be processed with a view to managing integrity risks and may not be used for commercial purposes, for example. Under the Wtt 2018 a maximum retention period of five years still applies for retaining the collected personal data after the client relationship has ended or following the provision of the trust service concerned.

4.2 Extension of UBO and PEP terms

In the implementation of the AMLD4, the definitions of 'ultimate beneficial owner' (UBO) and 'politically exposed person' (PEP) were extended in the Wwft with effect from 24 July 2018. These definitions are referred to in the Wtt 2018. This extension of these definitions means that trust offices will have to carry out a more stringent client screening in more cases.

The definition of UBO varies depending on the type of entity. For public and private limited companies, in principle it concerns the natural persons who directly or indirectly hold more than 25% of the shares, voting rights or the ownership interest in the company, or are the ultimate owner of or have a controlling interest in the company by other means. If no UBO can be designated, a fall-back option will apply. This option entails that the directors of the client or the object company (with trust service A or B) will be designated as the UBO.

The UBO register will simplify the identification of the UBO of the client and, where relevant, of the object company. The new bill for the UBO register was submitted to the House of Representatives on 4 April 2019. Partnerships and legal entities incorporated in the Netherlands must submit UBO information to the Chamber of Commerce. The implementation of the UBO register must have been completed no later than 10 January 2020. Once the implementation act has entered into force, those required to register have 18 months to submit their UBO information to the Chamber of Commerce.

The definition of PEP includes persons with a politically prominent function, family members of this person in the

first degree and persons closely associated with politically exposed persons. Where under the old legislation only persons living abroad could be designated as a PEP, under the Wtt 2018 Dutch nationals living in the Netherlands can also be a PEP.

4.3 Extra measures for services to high-risk structures

A trust office is required to obtain a full picture of the integrity risks associated with the provision of services to a particular client, both prior to and during the provision of those services. Where structures of legal entities or partnerships are not transparent or manageable, it may not be easy in practice to have the necessary information available fully and timely. The legislator has identified the following three specific situations in which the provision of services without additional, effective mitigating measures entails disproportionately high integrity risks.¹⁵

1. Check registration of object company in the commercial register

New is the obligation for trust offices to check whether the object company, as well as any other relevant group companies or affiliated entities, have complied with their obligation to register with the commercial register of the Chamber of Commerce or an equivalent register in another country.¹⁶ Trust offices are expected to refrain from providing services if this obligation to register has not been met. Not only will this prevent the possibility of concealment by using legal entities or companies that are unknown to the authorities, but also the failure of the object company to comply with its registration obligation may be an indication that the service entails integrity risks. In this light, a trust office is expected to carry out a further investigation into the purpose of the trust services to a legal entity or partnership if it is not registered in a commercial or equivalent register because no obligation to register exists for it in the country of its registered seat.

2. Monitor Dutch object company with operational activities abroad

The client screening process must be completed in full before the trust office can enter into the business relationship with the client and start providing services. The trust office is also required to continually

¹⁴ Regulation (EU) 2016/679.

¹⁵ Explanatory Memorandum II, 34 910, no. 3, p. 10.

¹⁶ Article 27(2)(f) Wtt 2018.

monitor the business relationship.¹⁷ This means that the trust office is expected to carry out a client screening as soon as there are indications that the client is involved in money laundering or terrorist financing, or if there is any doubt as to the accuracy and completeness of the information the client has supplied. If the trust office is unable to monitor the client continually, it must terminate the relationship with the client.

If the object company with its registered seat in the Netherlands carries out operational activities abroad, it will be more difficult for the trust office to keep monitoring the activities on a continual basis, especially if the transactions take place in foreign currency or in cash. It is therefore important for such object companies to have clear procedures in place to allow the business relationship and associated transactions to be monitored. Post-event compliance with the obligation to monitor transactions, for example, is not sufficient.

3. Monitor structure with a trust or separate fund

A third high-risk structure is one which ends in a trust or an equivalent separate fund, such as a foundation in Curaçao or a Dutch trust office foundation (*stichting administratiekantoor*).

With the establishment of some trusts, no specific beneficiary is identified or the beneficiary can be changed. This may have the aim or effect of concealing the beneficiary. The trust office must therefore establish the identity of the beneficiary with as much certainty as possible, and continue to do so during the business relationship. In order to achieve this, the Wtt 2018 lays down that if the trust office has not yet confirmed the identity of the beneficiary of the trust, the trust office must be aware of the framework within which the beneficiary can be designated at any given moment.¹⁸ This framework must be sufficiently specific for the trust office to allow it to determine whether the service can be abused. For example, this can be the naming of the group within which the payment can be made, such as a family. A trust office is therefore not permitted

to provide services to a trust where it is left open as to who the beneficiary will be. As soon as the trust actually makes a payment, the trust office must know the identity of the beneficiary.

In addition, the trust office must ensure that it is always informed at least 30 days in advance of any change to the beneficiaries of the trust, so that the trust office has enough time to carry out a proper check on the identity of the beneficiary.

4.4 Obligatory separation of trust services and tax advice

Under the Wtt 2018, a trust office is prohibited from providing trust services to a client, if that trust service executes tax advice that is given by the same trust office or a legal entity, natural person or partnership within that trust office's group.¹⁹ The purpose of this obligatory separation of trust services and tax advice is to safeguard the independent client screening carried out by the trust office before entering into a business relationship, and to prevent a conflict of interests. Under this new rule, for example, it is no longer possible for a trust office to advise its client on a tax-efficient structure and then to set it up and manage it.²⁰ The trust office is however permitted to submit a client's tax return, since this does not involve advice and is primarily an administrative act.

The requirement of keeping tax advice and trust services separate can be viewed in the context of an increasing focus on tax integrity risks. The Good Practices on Tax Integrity Risks²¹ for trust offices published by **DCB** pay attention to how a trust office can identify tax integrity risks in its portfolio and give some practical examples of the screening of individual clients with an increased risk profile. The Good Practices are not a policy rule of DCB, but are a guide for trust offices in interpreting and applying statutory obligations on the basis of the Wtt 2018 and secondary legislation.

4.5 Introducing institution

To stimulate an independent screening of the client and the nature and purpose of the intended trust service, the legislator decided that under the Wtt 2018 the trust office may no longer enter into a business relationship on the basis of a client screening that was carried out

17 See also Article 27(2)(k) and (3)(d) Wtt 2018.

18 Article 31(2) Wtt 2018.

19 Article 17 (2) Wtt 2018.

20 See also the report of the Parliamentary Investigation Committee, Parliamentary Papers II 2016/17, 34 566, no. 3, p. 12.

21 DCB Good Practices on Tax Integrity Risks for trust offices, via: <https://www.toezicht.dnb.nl/binaries/50-237850.pdf>.

by a third party, such as an accountant, lawyer, civil-law notary or tax adviser. Under the Wtt 2018 the screening must be carried out by the trust office itself, or by what is known as an 'introducing institution' (*introducerende instelling*) within the trust office's group. The definition of an introducing institution in the Wtt 2018 refers to the Wwft and includes organisations such as banks and other financial undertakings with their registered seat or branch in the Netherlands.

4.6 Obligatory exchange of information between trust offices

The Wtt 2018 introduces an obligation for trust offices to investigate whether another trust office has provided trust services previously to their (new) client.²² If it has, the new trust office must find out from the client's previous trust office whether any integrity risks had come to light. In principle, the trust office that receives the request is obliged to provide the requesting trust office immediately with the information it has asked for.

5. Expansion of DCB's supervisory instruments

The Wtt 2018 gives DCB, as the competent supervisor, more powers to supervise the trust sector effectively. Many of the changes ensue from the AMLD4 or give DCB the same powers as those it has under the Dutch Act on Financial Supervision (*Wet op het financieel toezicht*, **Wft**) with respect to other types of financial undertakings.²³ The main changes to the supervisory instruments are as follows.

- **New enforcement powers for the supervisor:**
 - From now on, DCB can disqualify a person from a profession.²⁴ This means that the person concerned will be temporarily banned from holding a policymaking position at a trust office or a Wwft institution. The ban may be imposed for up to a year, and can then be extended once only by another year.

- As a result of the requirements laid down in the AMLD4, higher maximum fines have been included and the regulator has been given the option to impose a turnover-related fine for the most serious category of infringements.²⁵ The amount of this fine will be determined on the basis of the annual turnover and will be a maximum of 20% of the trust office's net annual turnover.²⁶
- Finally, DCB has been given authority to issue a designation order (*aanwijzingsbevoegdheid*). DCB can impose a certain course of action on an infringer of a regulation in the Wtt 2018 that must be followed within a certain period of time.²⁷ If the infringer fails to follow this course of action fully and timely, DCB can impose an order subject to a penalty for noncompliance or an administrative fine.

- **Information exchange between regulators**

The arrangement for sharing information has been clarified in the Wtt 2018. In principle, DCB may share information on trust offices and its supervision of them with certain parties such as other regulators within the Netherlands and abroad, in particular the Dutch Authority for the Financial Markets (AFM) and parties that maintain the sanction lists on the grounds of the Sanctions Act 1977.²⁸

- **Authority to publish**

With respect to the options to publish fines, harmonisation is sought with the powers that DCB has on the basis of the Wft for financial undertakings. DCB has the option of publishing formal measures. It can also publish a warning in the event of an infringement, including naming the infringer if this is necessary to inform the public quickly and effectively in order to avoid or limit any loss or damage.²⁹

22 Article 68 Wtt 2018.

23 Explanatory Memorandum II, 34 910, no. 3, p. 13.

24 Article 53 Wtt 2018.

25 Article 50 Wtt 2018.

26 If the fine is imposed on an undertaking that is part of a group with consolidated financial statements, when calculating the fine, the net annual turnover from the consolidated financial statements of the ultimate parent company will be taken as the starting point.

27 Article 47 Wtt 2018.

28 Articles 56, 57 and 58 Wtt 2018.

29 Paragraph 7.2 Wtt 2018.

6. Practical tips

This Quoted describes a number of changes relevant to the business operations of trust offices. These changes have been effective since 1 January 2019. We give trust offices the following tips to check whether your organisation's business operations are compliant:

1. Check whether the manual of procedures of your organisation (still) needs to be amended to comply with the Wtt 2018, secondary legislation and the guidance by DCB. Think, for example, of the way the compliance function is set up, the new reporting requirements and the more stringent requirements for the client screening process.
2. The first time you contact an existing client – or earlier if necessary on the basis of the client's risk profile – make sure that all the information required under the Wtt 2018 is present in the client file. If it is not, we recommend that you update this information and check whether it has consequences for the services you provide to this client. The service files with the highest integrity risks must be the first to be updated.
3. Check whether your policy devotes sufficient attention to tax integrity risks with your organisation's clients.

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