LAW SOCIETY SUBMISSION

LAW SOCIETY OF IRELAND

EUROPEAN UNION (ANTI-MONEY LAUNDERING: BENEFICIAL OWNERSHIP OF CORPORATE ENTITIES) REGULATIONS 2019

DEPARTMENT OF FINANCE
DEPARTMENT OF BUSINESS, ENTERPRISE AND INNOVATION
COMPANIES REGISTRATIONS OFFICE

JULY 2019

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1 Introduction

1.1 The Law Society of Ireland (the “Law Society”) wishes to make the following submissions in the interests of clarifying some of the provisions of, and removing anomalies raised by, the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (the “2019 Regulations”).

1.2 Issues and recommendations covered within this submission include:

- Whether non-Irish-resident directors/beneficial owners need to apply for a PPSN;
- The impact of section 262 of the Social Welfare Consolidation Act 2005;
- Irish Collective Asset-Management Vehicles and compliance with the 2019 Regulations;
- The definition of beneficial ownership;
- PPS numbers of Senior Managing Officials;
- Typographical errors; and
- Previous submissions.

2 Whether non-Irish-resident directors/beneficial owners will need to apply for a PPSN.

2.1 The Law Society has recently become aware of a view that all non-Irish-resident beneficial owners (and all non-Irish-resident senior managing officials, where the details relating to such officials must be entered into the beneficial ownership register of a company), will also need to apply for and obtain PPS numbers. This is causing some confusion among affected companies and is likely to cause difficulties in practice, for a number of reasons.

2.2 First, the 2019 Regulations state at Regulation 5(2) that the obligation on relevant entities in this respect is to obtain and hold the PPS number of each beneficial owner "to whom such a number has been issued". There is no obligation under the 2019 Regulations on someone who has not been issued with a PPS number to obtain one. Further, while under Regulation 21(2) (b), there is a general power for the Registrar to request that there be delivered to him/her such information as he/she may determine for the purpose of Regulation 21, Regulation 21(2) (b) makes no reference to PPS numbers being a requirement for non-Irish-resident persons. In addition, Part 3 of the 2019 Regulations, including Regulation 21, is not yet in force. Accordingly there is, as of yet,no legal basis for any such determination to be made by or on behalf of the CRO or anyone else.

2.3 Secondly, the RBO website (rbo.gov.ie) indicates that: "PPSNs are also issued to non-resident persons who have dealings with Irish Government agencies, including the Revenue Commissioners".

2.4 In practice, we believe that a large number of non-resident beneficial owners or senior managing officials of Irish companies will not have had, and will not expect to have, any dealings with Irish Government agencies, including the Revenue Commissioners, and so requiring such persons to go through the detailed and time-consuming procedures required to obtain PPS numbers from the Minister would seem to be inappropriate and excessive.

2.5 Thirdly, the imposition of a requirement on non-Irish-resident beneficial owners and any non-Irish-resident senior managing officials to apply for and obtain PPS numbers will add a significant administrative and compliance burden on both any such non-residents (and their companies), and on the Minister, having regard to the detailed information and documentation requirements imposed under the 2005 Act which must be satisfied before any PPS number may be issued by the Minister.

2.6 Finally, we would query if the imposition of a requirement for non-resident beneficial owners or senior managing officials to obtain PPS numbers is justified under the Regulations, or under 4 AMLD or 5 AMLD. Article 30(4) of 4 AMLD (as amended) requires Member States to ensure that the information held in the central register is "adequate, accurate and current". However we would query if this obliges the Registrar to require all non-resident beneficial owners or senior managing officials to obtain PPS numbers, if another means exists of ensuring that the requirements under Article 30(4) can be met, such as seeking a declaration that the information provided to the Registrar is accurate.

2.7 Given the large number of non-resident beneficial owners or senior managing officials who would be affected by this obligation, and the likely timescales for the processing of the required information, we would suggest that, if any such requirement is currently being contemplated, it is reconsidered in light of the above concerns.

3 Impact of Section 262 of the Social Welfare Consolidation Act 2005 on the 2019 Regulations

3.1 The 2019 Regulations impose a new obligation set out in Regulation 5(2) on every relevant entity (as defined in the 2019 Regulations) to take all reasonable steps to obtain and hold the PPS number of every beneficial owner of the relevant entity to whom such a PPS (personal public service) number has been issued.

3.2 It is a criminal offence under Regulation 5(10) of the 2019 Regulations for a "relevant entity" (as defined) to fail to comply with this obligation. Every Irish company, body corporate or other legal entity incorporated in Ireland is included within the definition of "relevant entity" in the 2019 Regulations, other than a limited number of listed public companies.

3.3 The obligation to obtain and hold such PPS numbers appears to us to conflict with Section 262 of the Social Welfare Consolidation Act 2005, as amended (the 2005 Act).

3.4 First, under Section 262 (9) of the 2005 Act, it is a criminal offence for any person (which would appear to include a body corporate by virtue of the Interpretation Act 2005) to use a PPS number, or to seek to have a PPS number disclosed to that person, subject to a number of exceptions. However, none of the exceptions in the 2005 Act appear to permit companies which are within the scope of the 2019 Regulations, and which are complying with the obligation under Regulation 5(2) referred above, to obtain and hold PPS numbers of beneficial owners to whom such numbers have been issued.

3.5 Consequently, it would appear that any relevant entity which complies with its obligations under the 2019 Regulations by obtaining PPS numbers of beneficial owners of that entity will inadvertently commit a criminal offence under Section 262 of the 2005 Act.

3.6 It might be argued that, as the 2019 Regulations are implementing an EU Directive, the obligation therein to obtain PPS numbers "trumps" the prohibition on doing so in the 2005 Act. However while this argument could be made, neither 4AMLD nor 5AMLD actually prescribe that PPS numbers be obtained where these have been issued to beneficial owners, and so it is not clear if relevant entities can be advised that they can safely ignore the prohibition in Section 262 in complying with their obligations under Regulation 5(2).

3.7 A possible solution to this anomaly might be for the Minister for Social and Family Affairs (the Minister), to make regulations, as permitted by the 2005 Act, to add to the list of "specified bodies" set out in Schedule 5 to the 2005 Act to include, as a "specified body" for the purposes of section 262, a relevant entity, within the meaning of the 2019 Regulations, provided that it is complying with its obligations under the 2019 Regulations in relation to the obtaining and holding of PPS numbers. A specified body will not commit the offence under section 262 referred to above.

3.8 Secondly, we also discuss and comment below on a possible new requirement that non-Irish-resident beneficial owners (and potentially also non-Irish-resident senior managing officials) who do not already have PPS numbers will also need to apply for and obtain a PPS number. However it seems to us that the proposed Registrar of Beneficial Ownership (the Registrar) is not currently a "specified body", as defined in the 2005 Act, and it may therefore be questionable if a PPS number can be issued to non-Irish-resident beneficial owners or non-Irish-resident senior managing officials, as under Section 262 (2) of the 2005 Act, it appears that the Minister may only allocate such a number to a person who "is the subject of" a "transaction" (as defined) with a "specified body". An example of such a situation would be where a PPS number is issued to a non-resident selling shareholder for the purposes of the purchaser paying the necessary stamp duty on such share acquisition.

3.9 In addition, relevant entities which have already taken, or which will take in the coming weeks and months the necessary steps to obtain the PPS numbers of every beneficial owner of the relevant entity to whom such a number has been issued, as required by the 2019 Regulations, will merely be communicating with the beneficial owner(s) in order to obtain those numbers, and arguably will not have had any "transaction", as such, with the Registrar. It is a matter for the Minister to determine if in such circumstances he or she can issue PPS numbers to such persons, but it appears to us that the Minister's ability to allot a PPS number in such circumstances would not be as clear as the authority that exists in the example provided in paragraph 3.8, above.

4 Irish Collective Asset-management Vehicles

4.1 The 2019 Regulations are applicable to “relevant entities” as provided for under Regulation 4. Under the 2019 Regulations “relevant entity” means a corporate or other legal entity incorporated in the State and includes a company and any other body corporate so incorporated. Except for exempted companies under Regulation 4(2), the 2019 Regulations apply to all other companies, Industrial and Provident Societies, Irish Collective Asset-management Vehicles (“ICAVs”), semi-state bodies and any other corporate or legal entities incorporated in the State.

4.2 Part 3 of the 2019 Regulations sets out the obligations of relevant entities to file beneficial ownership information in the central register and also establishes the new register which is to be known as the “Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies”. Regulation 18 provides that the registrar will be known as the “Registrar of Beneficial Ownership of Companies and Industrial and Provident Societies”. Under Regulation 21(1)(c) the relevant entity is required to deliver to the Registrar the name and number of the entity as they appear on the register kept under the Companies Act 2014, or as the case may be, the register kept under the Industrial and Provident Societies Acts 1893 to 2014. ICAVs are registered in the Central Bank of Ireland and therefore they will not be able to comply with Regulation 21(1)(c). Under the 2019 Regulations there is a gap in the drafting. On the basis of the name given to the register and the requirements under Regulation 21(1)(c) it does not appear that the central register is intended to include the details of the beneficial owners of any entities other than companies or Industrial and Provident Societies.

4.3 The Law Society understands from the CRO that the “Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies” will only be accepting the beneficial ownership information for companies and societies and will not be accepting the relevant information for any other relevant entities, such as ICAVs etc. The Law Society understands that a separate central register will be established to deal with the beneficial ownership information for ICAVs which is likely to be the responsibility of the Central Bank of Ireland, being the designated body for regulation of ICAVs in Ireland.

4.4 Under the 2019 Regulations the relevant entities will have 5 months from 22 June 2019 to file the relevant information in the Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies. If the Registrar of Beneficial Ownership of Companies and Industrial and Provident Societies will not be accepting the relevant beneficial ownership information for any relevant entities other than companies or societies then the Department of Finance needs to urgently publish legislation for a central register for all other corporate and legal entities that are caught under the 2019 Regulations if they are to be able to comply with the 2019 Regulations.

5 Definition of “beneficial owner”

5.1 Regulation 2 of the 2019 regulations states that '“beneficial owner”, in relation to a relevant entity, has the meaning given to it by provision (6)(a) of Article 3 of the Directive'. Under provision 6(a) of Article 3 of the Directive, a person who ultimately “owns or controls” an entity will be its beneficial owner. The Law Society has previously sought clarification on how this operates in the context of corporate entities (see paragraph 5 of the Law Society's Submission on the Interim Regulations dated May 2017 which is attached at Annex 1). The Law Society would once again urge the Department of Finance to provide guidance in this respect as there are a number of instances where “beneficial ownership” is not clear i.e.:

- Under the provision of 6(a) of Article 3 of the Directive, the definition of who will be deemed to ultimately own or control an entity is further clarified where it refers to a shareholding/ownership interest of an entity of greater than 25%. The legislation goes on to state however that a shareholding/ownership stake of greater than 25% in an entity is only indicative of a person owning or controlling said entity. Given the legislative requirement for relevant entities to maintain a register of beneficial owners, we would ask that definitive guidance in regard to the shareholding/ownership percentage which will constitute an "owning or controlling" stake be clarified.

- The term ownership interest is not defined. This is particularly problematic where the relevant interest is controlled by a partnership especially when the owner in question does not control the partnership. This would be common in a partnership scenario where although a limited partner may well have an ownership interest of greater than 25% in the partnership the relevant person would not be entitled to control such partnership. In such circumstances, is it the responsibility of the relevant company to look behind the partnership which holds the interest to determine who controls it?

- Where security is taken over shares (via legal or equitable mortgage) uncertainty may arise as to whether the security provider or taker should be considered as owning or controlling the relevant shares for the purpose of the 2019 regulations. From a practical perspective, typically where the shares are secured under a legal or equitable mortgage the security provider retains the voting rights in respect of such shares prior to an enforcement event other than in circumstance where the security provider's actions would jeopardise the value of the shares. In such circumstances, we suggest therefore that it should be clarified that it is the security provider rather than the security taker whose shareholding should be considered for the purposes of establishing whether the 'ownership or control' threshold has been met.

6 PPS numbers of 'Senior Managing Officials'

6.1 Regulation 5(4) of the 2019 Regulations provides for the obligation on a relevant entity to list its 'senior managing officials' in its Beneficial Ownership Register where it cannot identify any beneficial owners.

6.2 It is not clear from Regulation 5(4) as to whether a relevant entity needs to obtain the PPS number of the senior managing official. The general view is that the relevant entity does need to obtain the PPS number as Regulation 5(4) imports the provisions regarding non-disclosure of PPS numbers from regulation 5(2). However, the 2019 Regulations do not actually impose an express obligation for the relevant entity to obtain and hold the PPS number of its senior managing officials.

7 Typographical Errors

7.1 There are a number of typographical errors in the 2019 Regulations:

- Regulation 5(8)(a) incorrectly refers to "designated entity" instead of "designated person" as is defined in the 2019 Regulations.

- Regulation 32 provides that "The European Communities (Anti-Money Laundering: Beneficial Ownership of Corporate Entities (Regulations 2016 (S.I. No. 560 of 2016) are revoked. "Communities" is incorrect and it should instead be "Union".

8 Previous Submission

None of the issues raised by the Law Society in its submission on the Interim Regulations (see Annex 1) have been addressed in the 2019 Regulations and the Law Society would once again ask the Department of Finance to consider providing clarity and guidance on the issues raised.

9 Conclusion

The Law Society hopes that the Department of Finance will find the above comments constructive and helpful and is available to engage further with the Department if required.

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ANNEX 1

LAW
SOCIETY
SUBMISSION

LAW SOCIETY
OF IRELAND

SUBMISSION OF THE LAW SOCIETY OF IRELAND ON THE EUROPEAN UNION (ANTI-MONEY LAUNDERING: BENEFICIAL OWNERSHIP OF CORPORATE ENTITIES) REGULATIONS 2016 (SI NO. 560 OF 2016) (THE "INTERIM REGULATIONS")

DEPARTMENT OF FINANCE
DEPARTMENT OF JUSTICE & EQUALITY

May 2017

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

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1. Context/Introduction

1.1 The Law Society of Ireland (the "Law Society") wishes to make the following comments on the Interim Regulations which transpose the first sub-paragraph of Article 30(1) of the Fourth Anti-Money Laundering Directive (Directive 2015/849/EU) (the "Directive") into Irish law.

1.2 On a general point regarding implementation, the Law Society regrets the lack of consultation in advance of the Interim Regulations being introduced, particularly in light of the fact that these Regulations include criminal sanctions. The Law Society believes that many of the issues and uncertainties set out below could have been avoided had there been a consultation process beforehand. The Law Society urges the Department of Finance and the Department of Justice & Equality to consider setting up an effective consultation process in relation to any and all future Irish regulations implementing the remainder of the Directive ("New Regulations"). The timeframe for such a consultation would not have to be particularly lengthy - the Law Society recognises that the implementation of the New Regulations and related legislation will more than likely be time-sensitive. However, providing sufficient opportunity for relevant stakeholders to lend their insight and experience to the Department of Finance and the Department of Justice & Equality could avert any potential difficulties in the implementation of any New Regulations, and therefore facilitate their introduction in an efficient manner.

1.3 Law firms have been advising clients on the application of the Interim Regulations since they came into effect on 15 November 2016. In that period a number of queries have arisen around the interpretation of certain terms and how the Interim Regulations operate in practice. Given that the Interim Regulations create a number of new criminal offences for both companies and individuals, it is important that there is a degree of legal certainty about the underlying obligations. The Law Society wishes to bring to the Departments' attention the following common uncertainties around the interpretation of the Interim Regulations that have been raised by a number of law firms:

- Meaning of the term "*regulated market*" as used in Interim Regulation 3(2) and transposition of Article 3(6)(a)(i) of the Directive with regard to companies in scope;
- Meaning of the term "*senior managing official*";
- Disclosure requirements in a group scenario where a subsidiary is wholly owned by a company that is out of scope;
- Meaning of the term "*ownership interest*"; and
- Meaning of the term "*current*".

These areas of uncertainty are discussed further below.

2. What companies are out of scope?

2.1 Regulation 3(2) of the Interim Regulations provides that they do not apply to companies that are:

(a) "*listed on a regulated market that is subject to disclosure requirements consistent with the law of the European Union; or*

(b) *subject to equivalent international standards which ensure adequate transparency of ownership information.* "

2.2 The Interim Regulations state that, for the purposes of Regulation 3(2)(a), "*disclosure requirements consistent with the law of the European Union includes the Transparency (Directive 2004/109/EC) Regulations 2007.*"

2.3 With regard to scope, the following questions arise:

(a) What is a "*regulated market*" - limb (a) of Regulation 3(2)?

Neither the Directive, nor the Interim Regulations, contain any definition or refer to any definition of the term. In other legislation, such as the Market Abuse Regulation ((EU) No 596/2014), this term is defined by reference to the definition in Directive 2014/65/EU (MiFID). It is presumed that, at a minimum, main markets within the EU must be included within this term. However, there is uncertainty as to whether companies listed on secondary markets, or on non-EEA regulated markets are covered by this "regulated market" exemption. Further, how should companies determine whether any disclosure requirements are "*consistent with the law of the European Union*"?

The UK has defined the "regulated market" exemption in their Register of People with Significant Control Regulations 2016 (SI 2016/339) ("PSC Regulations") by reference to companies with voting shares admitted to trading on a regulated market in an EEA state and to companies on certain specified markets in Switzerland, the United States, Japan and Israel. In the context of transposing the Directive into UK law, it is currently examining whether secondary markets should be brought into scope.

(b) What constitutes an "*equivalent international standard*" under limb 3(2)(b)?

Under section 1048 of the Companies Act 2014, shareholders in all public limited companies (whether listed or not) are required to disclose interests in shares in the public limited company where those interests are above 3%. It could well be argued that this is an "equivalent international standard" but there is no certainty that this is correct.

However, the Law Society understands that certain large Irish law firms are of the view that this 3% disclosure requirement is broadly consistent with the obligation to disclose voting and related interests at 3% under the Transparency (Directive 2004/109/EC) Regulations 2007.

In any event, the Law Society can confirm that it is the considered view of many of the largest law firms that the exemption contained in Interim Regulation 3(c) covers Irish incorporated PLCs listed on, inter alia, NASDAQ, AIM and IEX as these markets are regulated (to a greater or lesser extent) and are subject to rules which ensure transparency of ownership information. Clarity on the exemption should be contained in the New Regulations, if not beforehand in official guidance notes ("Guidance Notes"). The Law Society would welcome the publication of Guidance Notes as these would offer practical assistance in relation to the application of both the Interim Regulations and any forthcoming New Regulations.

(c) What entities are exempt under Article 3(6)(a)(i) of the Directive?

The Directive does not split the exempted companies into two categories; instead the relevant wording reads as follows; "…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." (Article 3(6)(a)(i)). The words "company listed on a regulated market" could possibly be read as applying to the second limb of the test also, i.e. that only companies listed on a regulated market are exempt and non-listed companies should not be afforded an exemption under the second limb as they appear to be under the Interim Regulations. If this is the correct reading of the provision, then this would render the query above about "equivalent international standards" moot.

3 Requirement to insert "senior managing official(s)" on register:

3.1 Where it is not possible to identify a beneficial owner, the Interim Regulations require that the names of one or more natural persons who hold the position of senior managing officials (SMOs) of the company be entered on the register as its beneficial owners. The term "senior managing official" is not defined in the Directive. The term "senior management" is defined (Article 3(12)) but the definition applies outside the context of Article 30 and, as a result, this term is not regarded as relevant here.

3.2 The term "senior managing official" is defined in the Interim Regulations as "including a director and a chief executive officer". It may have a particular meaning in other EU Member States where two-tiered boards are the norm.

3.3 With regard to SMOs, the following questions arise:

(a) Who are the SMOs of the company?

For instance, does an SMO include a non-executive director? The Regulations refer to an SMO as "including a director and a chief executive officer". No distinction is made between executive and non-executive directors and, as we know, the Companies Act 2014 does not recognise such a distinction (except in the case of appointments to the audit committee). Nevertheless, we believe that directors who are purely non-executives should not be included automatically as SMOs (as they appear to be in the Interim Regulations) given that in most cases, managing of the companies in question is delegated to other officers, which would be the executive directors and the C-level executives. While this is not a major issue (presumably non-executive directors are treated the same as other directors), the use of the word “including” indicates that persons other than directors and the chief executive officer could be SMOs.

In essence, the question is, does an SMO include other persons who may be exercising senior management responsibility but who are not directors, for example, the C.F.O.? It would appear that they may well need to be included in the list of SMOs and the relevant company will need to make this decision by itself. Is this correct as far as the Regulation is concerned? It is assumed all SMOs need to be added to the Register.

(b) What should be in the Register and when?

The general view is that, at least after sufficient time has elapsed to take reasonable steps, a company should not have an ‘empty register’ and certainly should not have an empty register by the time the remainder of the Directive is implemented in Ireland. In the UK, the guidance issued in conjunction with the PSC Regulations contains official wording to be included in the PSC register at various stages of the investigative process. The Law Society suggests that similar forms of wording should be contained in Guidance Notes to coincide with the relevant stages of the process to ascertain beneficial owners. Where SMOs are included in the Register, there should be standardised language (contained in Guidance Notes) setting out why the SMOs are included, should an FIU review the Register.

There is also uncertainty as to what it means to have “exhausted all possible means” to identify a beneficial owner before entering the names of the SMO (Regulation 4(4)). A question arises as to how this obligation sits with the obligation to “take all reasonable steps” to obtain the beneficial ownership information in Regulation 4(2). It should be clear to all corporate bodies within the scope of the Interim Regulations (and the New Regulations) whether the Register can be left blank while investigating the beneficial ownership, for how long it can be blank and/or what wording should be included when the reasonable steps are being taken.

Recital 13 of the Directive states “(t)here may be cases where no natural person is identifiable who ultimately owns or exerts control over a legal entity. In such exceptional cases, obliged entities, having exhausted all other means of identification, and provided there are no grounds for suspicion, may consider the senior managing official(s) to be the beneficial owner(s).” It is also not entirely clear from the Directive whether the senior managing officials in question are those of the entity in which no beneficial owner could be identified or the company itself. However, the Regulations are clear in this regard.

4. How do the rules apply in a group scenario?

4.1 The Regulations apply to every company in scope and neither the Regulations nor the Directive make reference to exemptions in a group scenario. It would appear that every company within a group that is in scope is required to maintain its own beneficial ownership register.

4.2 With regard to group companies, the following questions arise:

(a) Is the wholly owned Irish subsidiary obliged to “look behind” an exempt parent public limited company and insert the beneficial owners of that public limited company as its beneficial owners? It would not seem to make sense if this is what is intended.

A particular issue arises with regard to subsidiaries that are wholly owned by a public limited company that is listed on a “regulated market”. Obviously, the public limited company itself is not required to maintain a register as it is out of scope, but it appears the wholly owned subsidiary must maintain a register detailing the natural persons who are its ultimate beneficial owners. There is no provision in the Interim Regulations (it is submitted there should be) that would allow the subsidiary to note on its Register that it is wholly owned by an entity that is out of scope.

In a scenario where it is clear that it will not be possible to identify a beneficial owner of the public limited company, the Law Society is aware that some firms are of the view that it is appropriate to insert the names of the subsidiary’s SMOs on the register without carrying out any further investigations into the natural persons behind the public limited company. Could guidance on this be issued, or in some other manner could the Department of Finance and/or Department of Justice & Equality confirm their view on this point? The Law Society believes that clarification on this issue would be useful as it would prevent divergent, and possibly incorrect, approaches being adopted.

(b) Could an amending SI be issued, whereby a subsidiary that is wholly owned by an exempt public limited company would be exempted from maintaining a register?

The Law Society can confirm that this is the stated preference for some law firms and would appear to make sense as a pragmatic approach. In the alternative, it is suggested that the subsidiary should be permitted to insert the name of the exempt public limited company as its beneficial owner, as is the case in the UK. While this is not possible under the Regulations as they currently stand, it would be possible to amend the Regulations in the context of the implementation of the remainder of the Directive.

5. What is the meaning of "owns or controls" and "ownership interest"?

5.1 Under Article 3(6) of the Directive, a person who ultimately "owns or controls" an entity will be its beneficial owner. Some clarification is given as to how this operates in the context of corporate entities (see Article 3(6)(a)(i)), however, it may not always be clear who ultimately "owns or controls" an entity given that this term is not defined. In particular, it should be noted that although the Directive refers to a shareholding or ownership interest of more than 25%, this percentage is only an "indication" of ownership. Conceivably, there could be a scenario where the shareholding or ownership interest is less than 25% but the person in practice "owns or controls" the entity. The Law Society is of the view that official guidance would be useful in this respect.

5.2 There is no definition of the term "ownership interest" as used in Article 3(6)(a) of the Directive and a question has arisen as to how this should be determined in the case of an interest that is controlled via a partnership (in particular when the person in questions does not control the partnership). Is it up to the relevant company to liaise with its legal advisors (and possibly overseas legal advisors) to seek to determine the ownership interest and control?

5.3 Where security is taken over shares there may be uncertainty as to who is to be properly regarded as the beneficial owner of the shares. A mortgage over shares can take one of two forms: a legal mortgage or an equitable mortgage. Under a legal mortgage the security taker (or more normally its nominee) becomes the registered owner of the secured shares. Under an equitable mortgage the security provider remains the registered owner of the shares but the security taker is entitled to become the registered holder on enforcement. In practice, equitable mortgages are much more common than legal mortgages. However, in either type of mortgage, it is normal to provide that the security provider may exercise, or direct the exercise of, the voting rights attached to the shares unless and until an enforcement event occurs, provided the security provider does so in a way that does not jeopardise the security. After the occurrence of an enforcement event, the security taker is entitled to exercise the voting rights.

The Law Society considers that it would provide certainty (and lead to a more consistent approach) if it were clarified that rights attaching to shares held by way of security are considered to be held by the security provider where - apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it - the rights are exercisable only in accordance with the security provider's instructions.

This would be consistent with the approach adopted in the UK, see paragraph 23 of Schedule 1A of the Companies Act 2006 (as inserted by section 81 of the Small Business, Enterprise and Employment Act 2015).

6. What is the meaning of "current" in the Regulation?

It is not clear from the Interim Regulations how often a standard Irish company, which would not see regular changes to its share register, will need to take "reasonable steps" to ensure the information it holds is "current". For example, would the view of the Departments be that companies could assume that checking beneficial ownership every 12 months would be sufficient?

7. Conclusion

7.1 The Law Society notes the rationale for transposing Article 30(1) into Irish law in advance of the rest of the Directive, as set out in the Department of Finance's Information Note of January 2017. In order to effectively complete the exercise of gathering the necessary beneficial ownership data and recording this in companies' corporate beneficial ownership registers, as suggested in the Information Note, it would certainly be helpful to have some further guidance from the Department of Finance (and/or the Department of Justice & Equality) on the areas of uncertainty identified in this submission. While the interim Regulations make it a criminal offence for a company not to have taken steps to have a beneficial ownership register in place, the requirement to have a beneficial ownership register in place is also a corporate issue for companies involved in transactions where there is a requirement to produce the register as part of any due diligence carried out. Clarity from the Departments around the areas identified above would assist law firms in adopting a uniform approach to implementation of the Interim Regulations.

7.2 Aside from the above issues, it would also be useful to know what is proposed with regard to the Interim Regulations when the rest of the Directive is transposed. Is it intended to amend the Interim Regulations or replace them? As noted above, the Law Society believes that it is vitally important that there be some form of consultation on the New Regulations that will transpose the rest of the Directive. The Law Society believes that it would give better effect to the overall objectives of such legislation, and afford greater clarity to all involved, if the New Regulations were implemented after an appropriate period of consultation. For example, the Law Society suggests that a draft of the New Regulations could be provided in advance to the Law Society and other relevant bodies to seek submissions within an expeditious timeframe. Finally, the Law Society requests that the Departments provide information to give an indication of timing for the New Regulations, as such information would be of assistance to the profession in assisting clients meet their statutory obligations.

7.3 The Law Society makes this submission in the hope that the Department of Finance and the Department of Justice & Equality will find its content both constructive and useful in relation to two specific issues:

(i) Clarifying the application of the Interim Regulations in order to ensure a consistent and clear approach in their implementation; and,

(ii) Planning the transposition of the remainder of the Directive.

7.4 In addition, the Law Society would welcome an opportunity to meet with the Departments to discuss this submission in further detail and/or engage further in whatever fashion that the Departments believe would be of most benefit to all parties involved.

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