

LAW SOCIETY SUBMISSION



REGISTER OF BENEFICIAL OWNERSHIP OF TRUSTS

DEPARTMENT OF FINANCE

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Introduction

In advance of the publication of a draft statutory instrument by the Department of Finance to establish a national register of beneficial owners of trusts, the Law Society of Ireland is grateful for the opportunity to once more provide the Department with the Society's observations and recommendations.

The Society commends the Department for facilitating an excellent round-table consultation for affected industries on 26 February 2020.

This Submission supplements the Society's ongoing engagement and previous submissions and is based on the views of members of the Law Society's AML Task Force and Probate, Administration and Trusts Committee. Both the Task Force and the Committee are comprised of solicitors who have extensive experience and expertise in the practice of trusts law and a comprehensive understanding of the manner in which trusts operate in Ireland.

The Department will have received our detailed submissions in January and October 2019 which included:

1. a call for public and technical consultations,
2. detailed recommendations to help protect privacy rights and allow access proportionate to the purpose of the register,
3. recommendations to ensure clarity with the duties to take reasonable steps to obtain and hold relevant information,
4. a recommendation to remove the potential to award compensation to beneficial owners for any loss in relation to the register.

1. *The 'In-Scope/Out-of-Scope' Approach*

- 1.1. The Society has already made recommendations about the need to clarify and reduce, where feasible, the **potential for onerous impacts on the estates of deceased persons** and also on pensions. These types of trusts are examples of the need for the draft statutory instrument to carefully address the question of the potential scope of the register: **scope is of fundamental concern.**
- 1.2. Separately, the Society is alarmed by the potential for enormous numbers of low risk 'trusts' to be required to register and is calling upon the Department to transpose the trust register requirements in a way which is proportionate because **incidental 'trusts' arise in many different types of ordinary arrangements.** Solicitors and other trustees, including members of the public, will need to consider potential registration requirements in ordinary everyday contexts where there is no risk of money laundering. These **incidental trusts must be out-of-scope of the registration requirements.**
- 1.3. Given the limited transposition options, the Society recommends an approach of treating the very many different types of trusts/arrangements as being either clearly 'in-scope' or 'out-of-scope' of the registration requirements. Addressing the question of scope at this stage will prevent a situation whereby many innocent people could be perceived as being in technical breach of terrorist financing laws: a wholly disproportionate and, hopefully, avoidable result.
- 1.4. There is a concern too about the extent to which, by casting too wide a lens, **significant data protection and privacy risks will be introduced for low or zero risk 'trusts'**. There is the potential also that a very **wide scope will create an untargeted regime** that will be very **difficult, if not impossible, to manage and administer** for many involved, including potentially for Revenue.
- 1.5. Therefore, it is essential, at this early stage, to establish the correct parameters within which a trust must register.
- 1.6. The Society has identified below the types of trusts/arrangements which it is possible to categorise as being either in or out-of-scope. Within each of these categories, the Society has provided examples and also outlined specific recommendations which it is hoped will be of assistance to the Department.

2. *'In-Scope' Trusts/Arrangements*

2.1. An 'In-Scope' trust is a trust/arrangement in relation to which it is very clear, obvious and without doubt that it is captured by the Directive requiring beneficial owners to be registered. The Department may wish to adopt Biehler's definition of an express trust to assist in determining trusts/arrangements which are clearly 'in-scope'. The proposed application of the Directive to express trusts only is consistent with the principles of the Hague Convention on Trusts.

Biehler's definition of an "express trust"

2.2. Article 31 requires that 4&5AMLD principles be applied to "express trusts" which are defined by Biehler, 7th Edition, as trusts "created by express declaration of the settlor or testator, either by instrument inter vivos or by will".

2.3. This definition of an express trust is likely to provide the most helpful framework within which 4&5AMLD principles can be focused on entities which could reasonably be expected to be subject to Article 31 registration requirements.

2.4. Crucially, Biehler's definition has the potential to create a clear category of entities which it is reasonable to envisage should fall outside of scope.

2.5. For example, business arrangements which are contractual or established pursuant to other legal principles, but which may contain a trust implication for ultimate default or other commercial reasons, do not fall within Biehler's express trust definition and, therefore, can be regarded as out-of-scope.

Purposive interpretation of Article 31 requires an approach which is proportionate to the risks

2.6. The use of this definition of an express trust is compatible with a purposive interpretation of 4&5AMLD, as required by the European courts, which would require Article 31 to be read in accordance with the recitals to 4&5AMLD.

2.7. A purposive interpretation of recitals 27 and 28 enables individual Member States to take decisions on:

- whether or not a trust or a similar legal arrangement is comparably similar to corporate (and other legal) entities such that the trust should be subject to corresponding rules with respect to beneficial ownership information access; and
- the level of transparency with regard to such trusts or similar legal arrangements that are not comparably similar to corporate and other legal entities.

2.8. It is possible for the Department to take a risk-based and proportionate approach as it transposes 5AMLD which is also in line with both FATF and 5AMLD. Paragraph 2 of the Preamble to 5AMLD provides: "It is important to note that the measures taken should be proportionate to the risks."

- 2.9. It is important to highlight that the UK Government has signalled that it will define trusts which are within scope in a way that is proportionate to the risk. Across Europe, the same effect will be achieved, because other EU countries do not use trusts/arrangements in the manner in which they are used in Ireland or the UK.
- 2.10. Therefore, it would be disproportionate to extend the scope of trusts/arrangements beyond the confines of the definition of an express trust.

Legitimate interest threshold

- 2.11. For trusts which will be 'in scope', the Society also encourages the Department to give careful consideration to the evidence threshold for demonstrating legitimate interest. This will be especially important for express trusts involving families, vulnerable adults and assisted decision making. Any information about a "relevant person", as defined in the Assisted Decision Making (Capacity) Act 2015, must include a safeguard providing trustees (or similar persons) an opportunity to consider any third party request for information. There are a variety of potential representatives for the vulnerable adult including a decision-making assistant, co-decision maker, decision-making representative for the vulnerable adult, an attorney or a designated health care representative for the vulnerable adult.
- 2.12. Central to this will be the importance of reviewing requests to access especially-private information. It would be helpful if detailed information about the proposed technical operation of the register and access to it could be provided, including information about:
- the evidence threshold for demonstrating legitimate interest,
 - any notification processes that will be put in place to alert trustees of an information request in relation to their trust (the Law Society of England and Wales has recommended such a process to aid transparency and allow trustees to highlight information on vulnerable individuals in relation to whom information should not be disclosed. It would also enable the trust to make submissions to prevent information being provided to those who make vexatious requests which, on their face, may appear legitimate),
 - the time periods established around this decision-making process
 - the Government Department or Department(s) who will take responsibility for making these decisions as well as appeal bodies.
 - the Department's assessment of the effect on trusts holding or owning a controlling interest in a non-EEA corporate or other legal entity.¹
- 2.13. Section 3 of the Society's October 2019 Submission to the Department on Access to the Register of Beneficial Ownership of Trusts contains detailed recommendations to help ensure privacy rights are protected and access is facilitated only where it is proportionate to the

¹ In the UK, both HM Treasury and STEP have analysed the potential impact. For further information, please see paragraphs 9.18 to 9.19 and paragraphs 9.49 to 9.57 of HM Treasury's [Consultation Paper](#). In addition, please see page 3 (paragraphs 12, 14 and 15 of the 'Executive summary'), pages 23 to 25 ('Sharing of information') and pages 27 and 28 ('Non-EEA Companies) of the submission prepared by [STEP](#).

purpose of the register which is the prevention of money laundering. HM Treasury had proposed that any test as to whether a person has a legitimate interest in accessing the information contained in the register should be seen in that context. Both [STEP](#) and the Law Society of England and Wales (in its [June 2019 Submission](#)) support this interpretation. Part 4 of HM Treasury's [Consultation Process](#) indicates support for STEP's recommendations for legitimate access. The Law Society of Ireland recommends that the same philosophy underpin the transposition of the Directive in Ireland.

3. *'Out-of-Scope' Trusts/Arrangements*

- 3.1. Returning to the question of trusts which the Society recommends must fall outside of the scope of any registration requirement, there are many mechanisms which are referred to in Ireland as a trust/arrangement but which were clearly not envisaged as potentially falling within scope.
- 3.2. In practical terms also, it may not be possible to ever satisfy trust registration requirements for each incidental trust which can, sometimes, have a very short life-span. This is also true for in-scope express trusts which have a short anticipated life-span. For example, it would not be practical to require registration of beneficiaries of the estate of a deceased person. While a trust may be created, it is only temporary with low, if not zero, risk of the trust having been created to be used for money laundering.
- 3.3. The Society recommends consideration of two broad categories of out-of-scope trusts.

Incidental trusts/arrangements

- 3.4. Firstly, there are trusts which are incidental to a transaction where there is no real intention to ever transfer ownership/interest to the beneficial owner. These are a by-product of a conscientious 'belt and braces' approach to legal drafting. Trusts are often used as ultimate default mechanisms only.
- 3.5. During the course of the 26 February 2020 meeting, the Society provided an example of the many trusts which are created incidental to and during a single normal conveyance. In total, 11 incidental trusts are created, none of which fall within Biehler's definition of an "express trust" and for which **it would be disproportionate to require registration on the beneficial owners register.**
- 3.6. The 11 incidental trusts created during a single normal conveyance comprise:
 1. The vendor's solicitors takes up the title documents from the vendor's financial institution on **accountable trust receipt.**
 2. The auctioneer receives the **booking deposit** from the purchaser.
 3. The purchaser's solicitor receives the **balance of the contract deposit** from the purchaser.
 4. The vendor's solicitor receives the **balance of the contract deposit** from the purchaser's solicitor.
 5. **On exchange of contracts the beneficial interest on the property passes** from the vendor to the purchaser.
 6. The purchaser's solicitor **receives the loan funds** from the purchaser's financial institution.
 7. The purchaser's solicitor **receives the balance of the monies required to complete, stamp and register the title** from the purchaser.
 8. The **completion documents** are sent by the vendor's solicitor to the purchaser's solicitor **on trust pending completion.**
 9. The vendor's solicitor **receives the balance of the purchase price** from the purchaser's financial institution.

10. On completion, the **purchaser's solicitor now holds the title documents on trust** for the purchaser **pending stamping and registration.**
11. The **mortgage deed** will generally contain a **declaration of trust over the equity of redemption in favour of the relevant financial institution.**

Bare/quasi trusts

- 3.7. The second type of trusts is a bare/quasi-public trust where there is no transfer of ownership/interest to the beneficial owner, for example, student unions, golf clubs, sporting clubs. These trusts/arrangements are of an agency nature rather than a trust. For example, a students' union club may be constituted by a deed of trust and have a board of trustees in place. The status of the trustees would be set out in the union's constitution and trustees would hold assets on trust for the students union of which there would likely be many thousands of beneficial owners.
- 3.8. This example highlights the need to ensure these types of trusts/arrangements are out-of-scope. The task of registering the data of thousands of "beneficial owners" would become unwieldy for the Revenue in circumstances where it is never envisaged that the assets will ever transfer to any individual student.
- 3.9. Similar bare/quasi trust arrangements may underpin many sectors across Ireland and the effect of a registration requirement without a clear in-scope/out-of-scope policy could impact many organisations such as the GAA in terms of pitches, golf/tennis clubs, churches, graveyards etc. where assets are held on trust.

4. *Relevant approaches to trusts in the UK*

- 4.1. Key mechanisms which will be adopted in the UK when establishing a register of beneficial owners of trusts are identified below in the context of (1) proportionate assessment, (2) express trusts in and out of scope and (3) policy options. These approaches are evidence-based having been identified as part of a comprehensive [consultation process](#). It is important to note that many industry observations have been accepted by the UK Treasury.

Proportionate assessment

- 4.2. The UK has signalled that it will **define trusts which are within scope in a way that is proportionate to the risk**. This approach would be especially helpful for the in-scope trusts in Ireland but for which there is low to zero risk and where it is simply not practical to require registration (for example, the estates of deceased persons).
- 4.3. When assessing the question of **trusts which should be out-of-scope** from registration requirements, paragraphs 3.9 to 3.18 of HM Treasury's technical paper may be especially helpful to the Department.
- 4.4. The Society recommends careful consideration of the trusts which HM Treasury have indicated should fall out-of-scope, in particular, joint ownership and bare trusts. The outcome of further risk assessment around bare trusts must be closely followed before bare trusts are potentially brought within scope in Ireland. Some of these are trusts potentially and simply by default – they arise only from a 'belt and braces' approach to legal drafting.

"A. Statutory Trusts & Statutory Requirements

3.9 Statutory trusts are sometimes regarded as express trusts in the sense that they are not implied, resulting or constructive trusts. However, they do not result from the clear intention of the settlor and are therefore not within scope, for example, a statutory trust arising on intestacy.

3.10 Where a trust arises as a result of statutory requirements, the risk of the beneficial owners being able to manipulate the trust for money laundering or terrorist financing purposes is deemed to be low. Therefore, it is proposed that these trusts are not in scope of the requirement to register on TRS. This will include arrangements such as tenants' service charge contributions protection trusts.

3.11 The same considerations apply where a joint ownership trust exists solely for the purpose of jointly owning a home with a partner, relation or friend. This is the only way that a property can be held by more than one individual and does not arise from the intention of the settlors. It is proposed that these types of trusts will not be required to register. Any other trust set up to hold property, unless it falls within one of the other proposed categories that are out of scope, will need to be registered on TRS.

B. Other trusts

3.12 Where two or more people co-own an asset (for example, a bank account or shareholding) legally and beneficially for themselves with concurrent and not successive interests, it is proposed that these trusts will not be required to register.

As the legal and beneficial owners of the assets are the same, these arrangements do not meet the intention of the Directive, which is to capture arrangements that have the structure of a trust.

3.13 Bare trusts often exist by way of a contract between a nominee and the person with a beneficial interest, as well as in many commercial situations. In line with international anti-money laundering standards, more information is needed to ascertain the risk of bare trusts being used for money laundering or terrorist financing purposes. The government will continue to consider this in light of further representations from affected groups as part of this consultation.

3.14 Some express trusts are established in a specific form to meet the conditions of legislation but are not imposed by that legislation, for example, to meet the qualifying conditions for beneficial tax treatment. The government proposes that some of these types of trust will not be required to register. This is because they are limited by conditions prescribed in legislation restricting the use of trust property, with specified beneficiaries or types of assets held, so as to continue to qualify. This means there is less flexibility than in other trusts since any deviation from the restrictions would result in the loss of benefits and consequently the purpose of the trust. The inclusion of these trusts in TRS would therefore be disproportionate to the risk of them being used for money laundering or terrorist financing activity. For example:

- maintenance fund trusts for historic buildings*
- approved share option and profit-sharing schemes*
- vulnerable beneficiary trusts*
- personal injury trusts*

3.15 The use of trusts to hold life insurance policies, income protection policies or policies solely for the payment of retirement death benefits is often for estate planning purposes. Where the trust consists solely of a policy which is a pure protection policy and payment is not made until the death or terminal illness of the insured, it is proposed that these trusts will not be required to be registered on TRS as that would be disproportionate to the risk of them being used for money laundering or terrorist financing activity.

3.16 Registered pension schemes held in trust are already subject to regulation by either the Financial Conduct Authority or the Pensions Regulator. There are also income tax controls on sums going into and out of the fund, and the benefits that can be provided by the funds. These controls reduce the risk of them being used for money laundering and terrorist financing and it is therefore proposed that they are not in scope for registration. Pension scheme trusts that are not registered with HMRC on 'Pension Schemes Online' or 'Manage and Register Pension Schemes' will be required to register on TRS.

3.17 Charitable trusts are subject to different rules depending on where in the UK they operate. Although many charitable trusts will be registered with a charity regulator (The Charity Commission, The Charity Commission Northern Ireland, The Scottish Charity Regulator) there are several exceptions. The government proposes that charitable trusts are not in scope to register because the risk of these kinds of trusts being used for money laundering or terrorist financing activity is low.

3.18 Where a trust is already registered in another EU member state there is no requirement to also register on the UK's TRS for 5MLD purposes. An extract from that other register may be required to demonstrate registration when entering into a

business relationship or buying property in the UK under the general due diligence rules applying to obliged entities.”

- 4.5. This approach seems sensible and pragmatic. It seems to regard the principal categories of trusts which were the subject of concerns expressed in the Law Society’s January 2019 submission, as being out of scope of 5 MLD. It is helpful for trusts of real property, or those already separately regulated, including some pensions. For example, paragraph 3.13 addresses, in a practical way, implications for bare trusts which can arise in the course of commercial arrangements. The use of Biehler’s definition of an “express trust”, as recommended earlier, is also consistent with the apparent approach of HM Treasury to bare trusts.

UK Express trusts in and out of scope

- 4.6. Very helpfully, the Law Society of England and Wales, at paragraphs 6 to 17 of their [February 2020 Submission](#), identified a number of scenarios within which trusts could remain affected but for which registration would not be compatible with a purposive interpretation of Article 31.

“UK Express trusts in and out of scope

6. *The current proposals will require enormous numbers of low risk trusts to be registered. The TRS system would give rise to data protection and privacy risks for such trusts. The very wide scope will also create an untargeted regime that will be very difficult to manage for many involved, including potentially for HMRC. This could result in many people being put in technical breach of terrorist financing laws, which we consider would be a wholly disproportionate result.*
7. *To illustrate the current breadth of the proposals, here are some (non-exhaustive) examples of trusts in a variety of ordinary areas of personal and commercial life in the UK.*
8. **Pensions:** *Although there is a carve-out for registered pension schemes and for trusts holding life policies etc, there are still some gaps from a pensions perspective – for example where a trust is established to hold a lump sum death benefit for minors, and group life policies (45ZA(2)(d) is phrased in the singular). In both cases, registration is disproportionate to the risk that the trusts could actually be used for money laundering.*
9. **Incentives:**
 - *Private equity/private company: A nominee (typically an EBT - employee benefit trust - trustee acting as nominee) holds shares on behalf of managers. (This leads to a neater share register and assists in enforcement of compulsory transfer provisions under Articles and Shareholders’ Agreement).*
 - *Listed company: A nominee hold shares on behalf of executives to enforce holding periods and, increasingly, post-employment shareholding requirements (again, often an EBT trustee will be acting as nominee, but it could also be a corporate nominee provider).*

- *Transactions: It is common on public transactions for an EBT trustee to act as nominee for share plan participants in respect of shares to which they become entitled on vesting or exercise in connection with the transaction, pending acquisition by the bidder (whether under a scheme of arrangement or takeover offer - particularly on a scheme because of the timing of Court sanction/Effective Date, but also useful on an offer so that the nominee can accept the offer on behalf of all participants). In private transactions, the use of a nominee can similarly facilitate execution of a sale agreement by multiple employee shareholders (although use of a power of attorney is possibly more common).*

10. **Corporate:**

- *Sale agreements providing for shares to be held on trust pending payment of stamp duty and registration of the buyer in the share register.*
- *Business sale agreements requiring the benefit of contracts to be held on trust pending counterparty approval of the assignment.*
- *Completion monies held on trust.*
- *Nominee share arrangements.*

11. **Structured finance:** *Securitisations involve multiple trust arrangements (and many such deals have very long maturities), so the sheer number of trusts that will become subject to registration requirements will be overwhelming whilst arguably bringing little benefit to the authorities that combat money laundering/terrorism financing as these are not the type of structures that would give rise to such concerns. Bare trust arrangements are commonly employed in a number of different contexts in UK structured finance transactions, which are driven by structural considerations in general and, in some cases, by the rating agency requirements as well. This is not an exhaustive list of all possible bare trust arrangements, but highlights some of the most common ones. For example, in a typical UK securitisation, each transaction will have at least:*

- *Bond trust, whereby the SPV Issuer's covenant to pay under the bond terms and conditions is held on trust for the benefit of noteholders/investors with a corporate trust company performing the role of the Bond Trustee.*
- *Issuer security trust, whereby the benefit of security created over the securitised assets and certain other rights under the transaction documents is held on trust for the benefit of noteholders/investors and certain other transaction parties, who are secured creditors, with a corporate trust company performing the role of the Security Trustee.*
- *Share trust, whereby the UK SPV Issuer is set up as a wholly owned subsidiary of an SPV holding company whose one or two shares are held on trust for certain charitable and noncharitable classes of beneficiaries, with the corporate services provider performing the role of the Share Trustee.*
- *In addition, when setting up a UK SPV Issuer and its holding company, a series of (written) trust arrangements for capitalisation monies will also be put in place, with the corporate services provider acting as the relevant trustee.*

- *Collection account trust, whereby the originator declares a trust in favour of the SPV Issuer/Security Trustee over its interest in the collection account to the extent such interest is attributable to the securitised assets, which addresses the rating agency criteria requirements relating to the securitised assets' isolation from the originator's insolvency and mitigation of commingling risk.*
 - *A series of turnover trusts will be provided for in the asset sale agreement and related servicing agreement dealing with monies received in connection with the securitised assets, or repurchased assets, to be held on trust where such monies cannot be immediately transferred to the relevant transaction party, such as the SPV Issuer, the Security Trustee or the originator.*
12. *Also, certain types of structures would give rise to other trust arrangements, in addition to those that are typical for any UK securitisation, for example:*
- *In a true sale structure, where the underlying contracts contain a prohibition on assignment, the asset transfer may be achieved instead via an originator trust, whereby the originator of the assets declares a trust over the securitised assets for the benefit of the SPV Issuer.*
 - *In a secured loan structure, in addition to the Issuer security trust, the security will also be created and held on trust at the Borrower level (borrower security trust), so that the Borrower Security Trustee (the role performed by a corporate trust company) will hold security granted by the Borrower on trust for the lender (ie. the SPV Issuer).*
 - *In a UK master trust programme structure, which is commonly employed for securitisation of UK credit card receivables and mixed portfolios of residential mortgages, the assets are sold to the Receivables/Mortgages Trustee who holds the securitised assets on trust for the benefit of the SPV funding entity and the seller.*
13. **Banking/Restructuring:**
- *A security trust in syndicated loan agreements (query whether this is subject to the facilities agreement exception in the draft Regulations).*
 - *A turnover trust in a subordination agreement.*
 - *The back-up trusts that are included in receivership/administration sale agreements where, for whatever reason, it is not possible to transfer legal title in the assets (see above in the context of a general sale agreement but it comes up very often in an insolvency context because of the need to effect a quick sale without much negotiation).*
 - *Some escrow agreements.*
 - *Trusts of the proceeds of on-sale in retention of title clauses.*
 - *Purpose trusts where moneys are lent to a borrower (often in financial distress) to be used for a specific purpose. As a matter of law (eg Barclays Bank v Quistclose) this creates a trust over the funds until applied for the purpose, but this position is often made explicit in the documents.*

14. **Real estate:**

- *Sellers holding properties on trust for buyers during the registration gap between contractual completion and registration at Land Registry.*
- *Nominees holding properties on bare trusts for third parties.*
- *Joint venture (JV) vehicles where the JV assets are held on trust for the JV parties.*
- *Rent deposits and service charge payments held in relation to commercial leases.*
- *Property managers/estate agents holding rent collected from tenants in their client accounts for the benefit of their landlord clients.*

15. **Bank accounts for minors:** *Under the current proposals, bare trusts such as parents holding funds in a bank account for a minor child appear to be within scope.*

16. **Will trusts etc:** *trusts are extremely common in Wills. Trusts arising in a Will pose a very low risk in terms of money laundering and terrorist financing since they only come into existence following a person's death. Types of trust typically found in Wills include discretionary trusts as well as the following types of trust prescribed by legislation:*

- **Trusts for bereaved minors² (BMTs)** - *these are a type of vulnerable beneficiary trust which can arise as a result of an intestacy as well as in a Will. We support the proposal that these are outside the scope of trust registration and presumably a specific exclusion will be required to remove them from registration under regulation 45 to the extent that these are taxable relevant trusts and not simply a new, type A trust?*
- **18-25 trusts** - *these are another type of trust for a bereaved child under age 25 and must comply with the conditions prescribed by s71D of the Inheritance Tax Act 1984 (IHTA 1984) - our understanding is that these are not strictly vulnerable beneficiary trusts and so will be in scope. If BMTs are to be excluded, it would seem logical to exclude 18-25 trusts too since these trusts must meet the same, strict, income and capital requirements as other vulnerable beneficiary trusts.*
- **Immediate post-death interests (IPDIs)** - *these trusts can only be established in the circumstances prescribed by s49A of the IHTA 1984. They must be effected by Will and arise immediately following a death, giving the beneficiary an immediate entitlement to income. IPDIs are often used to provide for a deceased person's surviving spouse or civil partner, especially in second marriages so that the deceased's assets can pass to children from a former relationship after the second spouse's death. IPDIs can also be used to provide income for a deceased person's children or grandchildren. In fact, an IPDI can arise inadvertently if a Will contains an 18-25 trust, yet the deceased's children reach age 18 within two years of death and acquire a statutory right to income under s31 Trustee Act 1925.*

² In Ireland, the companies SI does provide for Minors. Consideration is also need around trusts for vulnerable adults moving away from the registration requirement and safeguards around access to the register towards a more proportionate approach where the trust should not be required to register in the first instance because there is no risk of money laundering/terrorist financing.

- *Transitional serial interests (TSIs) - although not confined to Wills, these are another type of trust that can only now arise following a death in the limited circumstances prescribed by s49D and 49E of IHTA 1984 (e.g. where a surviving spouse takes a successive life interest following the death of a beneficiary with a previous, qualifying interest in possession).*

17. **Pilot trusts:** *these trusts are established with a nominal sum (say £10 or £100) and effectively sit dormant until further funds are added at a later date, perhaps by a gift from a Will after a death, or from pension death benefits or a life insurance policy following a death. It is common to establish a trust in this way. Trusts of this sort pose a very low risk in terms of money laundering and terrorist financing until such time as the more substantive funds are added."*

Policy options

4.7. The Law Society of England and Wales have also developed some helpful "policy options" for the UK Government which will address the potential issues for trusts which may still come within scope despite the pragmatic approach already being taken.

4.8. The relevant extract from the LSEW's [February 2020 Submission](#) is set out below.

"18. We welcome the specific exclusions proposed for certain types of trusts, including defined charitable trusts, vulnerable beneficiary trusts, personal injury trusts, pensions, and life insurance trusts, a number of which we flagged in our 10 June 2019 submission in response to the previous consultation on 5MLD. However, as the current Con Doc recognises, trusts are an integral aspect of the UK legal system and part of the personal, commercial, and public life of the UK. In that context, we continue to have significant concerns with the breadth of registration requirements for UK-resident express trusts, as illustrated by the non-exhaustive list of examples above.

19. Further specific exclusions will be important to give certainty in key areas where there is enough clarity, but it would remain difficult to frame the rules proportionately in the time available using specific exclusions alone. The government should consider introducing more flexible generic exclusions with a view to tailoring a more proportionate and practicable framework for the UK context.

20. Such exclusions might, for example, focus on exclusions for trusts that have one or more of certain low risk "hallmarks". Such hallmarks might include some or all of the following examples:

- a. A de minimis hallmark, under which trusts with assets of, say, £100 or less, are excluded (with a reporting requirement triggered if they subsequently acquire assets above that level).*
- b. A regulated or authorised person hallmark for trusts arising out of, or in connection with, ordinary course commercial transactions or agreements where a regulated or authorised person has a sufficiently significant role in relation to the transaction or agreement.*
- c. A registration hallmark to exclude situations where the only asset of the trust is shares in a UK or EU company, on the basis that the PSC register regime*

(or equivalent in the EU) will apply and will serve the transparency objective. This hallmark could also be framed to exclude situations where the only asset of the trust is land registered at HM Land Registry or a bank account which will be included on the forthcoming register of bank accounts, so as to take jointly owned land, joint bank accounts, and bank accounts for minors out of scope.

- d. A short-term trusts hallmark for trusts that are not “comparably similar to corporate and other legal entities” (in the words of Recital 27 of 5MLD) because they are effectively short term mechanisms which are ancillary or subsidiary to ordinary commercial arrangements. (This might apply, for example, to share sale agreements providing for shares to be held on trust pending payment of stamp duty and registration of the buyer in the share register.)*
- e. A predetermined and highly controlled trusts hallmark, following the idea set out in paragraphs 3.4 and 3.14 of the Con Doc. This would take vulnerable beneficiary trusts out of scope (provided they are not confined to type A trusts) and could also be extended to 1825 trusts, IPDIs and TSIs discussed above, and perhaps other Will trusts, if appropriate.*
- f. A bare trust hallmark - bare trusts should be excluded because payments to beneficiaries are in a very real sense predetermined and highly controlled because the trustees must act on the beneficiaries' instructions and can only pay the trust assets to the beneficiary or as the beneficiary directs. This should include bare trusts for minors including bank accounts set up for children.*

21. Such an approach could then be usefully explained in guidance suitable for the wide range of different audiences who will be affected. We would be happy to engage further about such an approach, as and when helpful.

22. In relation to guidance in connection with the scope of the rules, we consider it could also usefully explain HMRC’s view of what constitutes an express trust for this purpose, which could also be an important limiting factor in relation to the scope of trusts that are reportable.”

5. *Important considerations for the General Scheme for a Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019*

- 5.1. The Society recommends consideration of two potential impacts that the creation of beneficial ownership registers will have when transposing 5MLD in the General Scheme for a Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2019.

Exempt designated persons when they are the trustee who has registered the trust's beneficial owners

- 5.2. The Society also recommends consideration of the manner in which, in the future, a trustee will be the person registering details on the register and, at the same time, a duty will arise to also check the register because they will be providing an AML-regulated service. For example, solicitors may be a trustee registering the beneficial ownership details and, at the same time, be subject to a duty to confirm beneficial owners details are registered because they provide the trust with an AML-regulated legal service. The Society recommends an exemption from having to check the register where the designated person is a trustee who has registered the beneficial ownership data.

Impact on definition of "business relationship"

- 5.3. The Law Society of England and Wales (LSEW) has also raised a number of questions about the business impact of the proposed treatment in the UK of "business relationship". It is important to ensure that professional service providers in Ireland are not disadvantaged relative to the position of professionals in the UK. The following is an extract from the LSEW's February 2020 Submission.

"When does a business relationship require a non-EEA trust to register on TRS?"

23. We reiterate the concerns expressed in our 10 June 2019 consultation response on 5MLD concerning the registration requirements for non-EEA trusts with UK business relationships. We anticipate that the current proposals would likely result in offshoring and potentially increasing AML risks as non-EEA trusts are disincentivised from engaging UK advisers (or other UK service providers such as investment managers or custodians). The proposals would also likely harm the businesses of UK professionals who otherwise help apply one of the most stringent AML compliance frameworks in the world. We are already hearing concerns raised by members whose businesses are affected.

24. To put these concerns in some economic context, the UK exported approximately £5bn worth of legal services in 2017, and imported approximately £0.80bn (see the KPMG report for the Law Society on the [Contribution of the UK Legal Services Sector to the UK Economy](#), January 2020). It therefore contributed positively toward the UK's balance of trade, and had the highest balance of trade among professional services sectors in the UK.

25. We consider that a proportionate approach given these factors would be for the business relationship trigger to be limited to trusts which are administered in the UK. The technical basis for such an approach is discussed in the paragraph below. There was a clear suggestion in the previous consultation document (at para 9.19) that this is how that trigger would apply and in fact it was stated that it would only apply to trusts "deemed to be administered in the UK by virtue of having one UK trustee."

26. On a strict reading of 5MLD, new paragraph 1 of Article 31 obliges Member States to require trustees of "of any express trust administered in that Member State" to obtain and hold beneficial ownership information regarding the trust. The paragraphs which follow the amended Article 31 relate back to trusts and similar legal arrangements referred to in paragraph 1. So, for instance, paragraph 2 requires "trustees or persons holding equivalent positions in similar legal arrangements as referred to in paragraph 1" to disclose the beneficial ownership information to obliged entities and paragraph 3a, which deals with the requirement for the beneficial ownership information to be included in a central register, also relates to "express trusts and similar legal arrangements as referred to in paragraph 1", namely those administered in the Member State concerned. Arguably, the provision in para 3a which requires non-EU resident trustees to register on forming a business relationship or acquiring real estate is limited to non-EU resident trusts which are also administered in the Member State.

27. In relation to the commencement provisions for such trusts, the original consultation on the transposition of 5MLD stated very clearly that 5MLD requires the scope of the register to be expanded to non-EU resident express trusts that enter into a **new** business relationship with an obliged entity on or after 10 March 2020. We understand that is the government's intention, although we note that that is not reflected in the current draft Regulations."

6. Conclusion

- 6.1. The Law Society hopes that the Department will find the above comments constructive and helpful. The Society urges the Department to consider carefully the practical consequences of a too-broad interpretation of the requirement to register the beneficial owners of trusts. Scope is of fundamental concern given the potential for an enormous number of zero and low risk trusts/arrangements to be required to register.
- 6.2. Members of the Society's AML Task Force and Probate, Administration and Trusts Committee would be happy to meet again with Department officials to discuss any aspect of this submission.

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