

LAW SOCIETY SUBMISSION



SUBMISSION ON ACCESS TO REGISTER OF BENEFICIAL OWNERSHIP OF TRUSTS

DEPARTMENT OF FINANCE

October 2019

Contents

Introduction	3
1. Garner and engage with the views of the public by holding a public consultation process similar to the recent process in Britain.	4
2. Introduce by way of legislation through the Houses of the Oireachtas.	4
3. Protect privacy rights and only allow access proportionate to the purpose of register which is to prevent money laundering.	5
4. Research, resolve and consult in relation to the technicalities of creating a register.	6
Conclusion	7

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 would welcome the opportunity to once more bring the significant risk to the privacy of individuals to the attention of the Department.

By way of background, the Law Society is the educational, representative and regulatory body of the solicitors' profession in Ireland. In addition to the statutory functions it exercises under the Solicitors Acts 1954 to 2015, the Society is also the competent authority for the monitoring of solicitors for the purposes of compliance with Ireland's anti-money laundering ('AML') and counter-terrorist financing ('CTF') laws under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 as amended ('the Act'). In addition to its competent authority role, the Society:

- (1) informs solicitors about their AML duties and raises awareness of money laundering and terrorist financing risks;
- (2) provides both general and tailored guidance to solicitors about their AML obligations;
and
- (3) educates solicitors about their AML duties.

This Submission outlines the concerns of solicitors who act in the purchase and sale of real property, draft Wills, administer estates of deceased persons, draft trusts and advise trustees (including pension trustees) and families on their use, about the manner in which access to a national register of beneficial owners of trusts will interfere with individual privacy rights. This submission 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 trust law and a comprehensive understanding of the manner in which trusts operate in Ireland.

1. *Garner and engage with the views of the public by holding a public consultation process similar to the recent process in Britain.*
 - 1.1. In the UK, HM Treasury concluded, in June 2019, a two month [public consultation process](#) on the transposition of the EU Fifth Anti-Money Laundering Directive (5AMLD). In addition, a technical consultation in relation to the register to be established in Britain will take place later in the year.
 - 1.2. While designated bodies have been invited to make recommendations in relation to the draft statutory instruments to establish registers of beneficial owners in Ireland, regrettably, to date, there has been no consultation with the public in Ireland.
 - 1.3. Public access to the central register of trust beneficial ownership, irrespective of whether a trust engages in any business activity or has any interest in an entity which carries on any business activity, will be permissible in circumstances where an applicant can show 'legitimate interest'. This raises significant privacy as well as potential personal security concerns for members of the public who may already be a beneficial owner or, at some stage in the future, become a beneficial owner. That term, by reference to SI 16 of 2019 made pursuant to the Act, and 4/5 AMLD, in addition to including a settlor, trustees, protector(s) and any other natural persons exercising ultimate control, also includes every natural person in the beneficial class of a trust, whether an adult or a minor, and whether capable or a relevant person for the purposes of the Assisted Decision Making (Capacity) Act 2015, who requires a certain level of support in decision making.
 - 1.4. The Society believes that the gravity of these issues warrants public consultation and, while access to the central register is required by 5AMLD, the legal basis for this access must be delicately construed and navigated following a full public consultation process in order to ensure as little interference as possible with individual privacy rights.
2. *Introduce by way of legislation through the Houses of the Oireachtas.*
 - 2.1. The Society urges careful consideration when developing national law to address public access to sensitive information. Given the extent to which individual privacy rights will be impacted by the creation of a trusts register, the Society believes that the mechanisms of access to the register warrant transposition by legislation fully debated in the Houses of the Oireachtas rather than by Statutory Instrument.

3. *Protect privacy rights and only allow access proportionate to the purpose of register which is to prevent money laundering.*
- 3.1. Article 30(5)(a) envisages that, in the future, information about beneficial ownership on national central registers will be accessible in all cases by competent authorities and FIUs without any restriction. Article 30(5)(b) permits access by obliged entities when completing their AML due diligence. Article 30(5)(c) will permit any member of the public to access the register including, at least, the name, month and year of birth, country of residence and nationality and nature and extent of beneficial interest held. Member States can provide for access to additional information enabling identification of beneficial owners in national law including date of birth or contact details.
- 3.2. The main purpose of the trust register is to prevent the use of trusts or similar legal arrangements for the purposes of money laundering, terrorist financing or associated predicate offences (recital (27) of the preamble to 5MLD). HM Treasury has 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](#) support this interpretation. The Law Society of Ireland recommends that the same philosophy underpin the transposition of the Directive in Ireland.
- 3.3. In tandem with the requirement to have regard to the proportionality of the purpose for the creation of trust registers, Member States must also have due regard to the protection of fundamental rights of individuals, in particular the right to privacy and protection of personal data (recital (28) to 5MLD).
- 3.4. Accordingly, in order to draw an appropriate balance across these two principles, it is important that the test for legitimate interest is not drawn so narrowly that it obstructs the ability of the person seeking the information to obtain evidence of money laundering or terrorist financing but at the same time the test must prevent speculative enquiries, fishing expeditions or people trying to obtain information who, in reality, want it for some other purpose.
- 3.5. In order to balance these competing objectives, STEP has recommended to HM Treasury in the UK a test with flexibility on the basis of evidence which must be provided in order to support an application for access to the register. The person seeking disclosure must:-
 1. “be involved in an investigation relating to money laundering or terrorist financing;
 2. believe that the particular trust or the particular individual in relation to which disclosure is sought is involved with the money laundering or terrorist financing in question;
 3. produce evidence based on which it would be reasonable to conclude that their belief is objectively reasonable – i.e. the evidence must show that there is more than just a vague suspicion but does not need to go so far as to prove (even on the civil standard of the balance of probabilities) the involvement of the relevant trust or individual.”

In addition, the following safeguards should be provided:-

- a) “unless it would prejudice an ongoing criminal investigation, the relevant individual or the trustees of the relevant trust should be notified of the application for disclosure, with full details of the name and address of the person seeking disclosure and the basis for the legitimate interest claim;
- b) the trustee/individual should have the right to make representations before any decision is made in relation to the disclosure application;
- c) there should be a right of appeal to a tribunal against HMRC’s decision in relation to disclosure (and not just a right to apply for judicial review);
- d) it should be a criminal offence for the person receiving the information to use it for any purpose other than the relevant investigation in relation to money laundering/terrorist financing or to pass the information on to any other person in the knowledge that it would or may be used for any other such purpose.”

3.6. These recommendations are in line with recitals (38) and (42) of the preamble to 5MLD which anticipate that a beneficial owner may be notified of any request for disclosure and the possibility of appeal rights against decisions which grant or deny access to beneficial ownership information.

4. *Research, resolve and consult in relation to the technicalities of creating a register.*

4.1. It would be helpful if detailed information about the proposed technical operation of the register and access to it could be provided. Such technical information could include information about:

- the evidence threshold for demonstrating legitimate interest,
- the Department’s assessment of the effect on trusts holding or owning a controlling interest in a non-EEA corporate or other legal entity. 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](#).
- 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.

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.

For further information please contact:

Mary Keane
Deputy Director General
Law Society of Ireland
Blackhall Place
Dublin 7
DX 79

Tel: 353 1 6724800
m.keane@lawsociety.ie