

# LAW SOCIETY SUBMISSION

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**RECOMMENDATIONS ON DRAFT REGULATIONS  
ENTITLED 'EUROPEAN UNION (ANTI-MONEY  
LAUNDERING: BENEFICIAL OWNERSHIP OF TRUSTS)  
REGULATIONS 2019'**

DEPARTMENT OF FINANCE

JANUARY 2019

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## Introduction

The Law Society of Ireland welcomes the opportunity to make a submission to the Department of Finance in relation to draft Regulations entitled “European Union (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2018 (the ‘Regulations’). The primary purpose of the draft SI is to give effect to paragraph (1) of Article 31 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015.

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.

**1. *Provide adequate time between the making of the Regulations and commencement of its provisions to facilitate establishment by trustees of beneficial ownership registers in accordance with the Regulations.***

1.1. The Regulations will require obliged entities to seek and obtain information from third parties from the date of commencement. In some instances, professional advice may also be required. Accordingly, it is anticipated that the exercise of collating the data required by the Regulations will require a reasonable amount of time. However, Regulation 7 creates a number of offences for failure to comply with the Regulations from the date of commencement of the Regulations.

1.2. Therefore, the Society recommends a transitional period of six months from the date of commencement of the Regulations. A transitional period will enable all obliged entities to avoid being placed in breach of the Regulations from the outset.

**2. *Bring clarity to the meaning of the term “take reasonable steps” to obtain and hold relevant information in Regulation 3(1).***

2.1. The Society recommends that clarity be provided to obliged entities about the interpretation of the term “take reasonable steps” to obtain and hold information for a number of reasons.

2.2. Circumstances could arise whereby, despite the best efforts of a trustee, it may not be possible to obtain the requisite information from a beneficial owner. However, Regulation 7 creates an offence of failing to comply with Regulation 3(1) and, in the above circumstances, it would be unfair to apply a criminal penalty to the trustee.

2.3. Therefore, the Society recommends that the Regulations clarify that communication with a natural person within the definition of beneficial owner by post or email, be recognised as sufficient action by a trustee to discharge their obligations pursuant to the Regulations. Otherwise, it is likely that disproportionate time and expense may be incurred in endeavouring to satisfy this obligation.

2.4. In addition, in relation to natural persons who are members of a beneficial class of, for example, a pension trust, or a discretionary trust, section 28 of the 2010 Act includes any individual entitled to a vested interest (defeasible or not) in the capital in the trust property as a beneficial owner. Section 33(7D) of the 2010 Act requires a designated person to:

“obtain sufficient information concerning the beneficiary to satisfy the designated person that it will be able to establish the identity of the beneficiary at the time of the pay out, or at the time of the exercise by the beneficiary of its vested rights.”

2.5. Therefore, there is no statutory obligation on a designated person to contact such a beneficiary until that person, by reference to their entitlements, is about to receive a financial benefit from a trust. The Society recommends that consideration be given to the replication of this principle in the Regulations so as to avoid any unnecessary obligation

being placed on designated persons. It is also important to avoid any obligation being placed on obliged persons and trustees which could be misinterpreted by a natural person as inferring they have some greater entitlements in relation to a trust in advance of any such entitlement arising.

**3. *Clarify that, when the term “beneficial owner” refers to a member of the beneficial class of a trust, such references are to natural persons only.***

- 3.1. Article 3(6) of the Directive defines “beneficial owner” as “the natural person(s) on whose behalf a transaction or activity is being conducted.” Regulation 2(1) defines “beneficial owner” by reference to the Directive.
- 3.2. The Society believes it may be beneficial to clarify in the Regulations that beneficial owners do not include non-natural persons such as, for example, charitable organisations.

**4. *Remove the potential to award compensation to beneficial owners for any loss in relation to the register of beneficial owners.***

- 4.1. Regulation 6(4) introduces a procedure whereby an application can be made to the High Court to order rectification of the register and “payment by the trustee...of compensation for any loss sustained by any party aggrieved.”
- 4.2. The Society appreciates the need to introduce a procedure whereby the High Court is empowered to rectify a beneficial ownership register in appropriate cases.
- 4.3. However, there is no requirement to introduce a procedure to provide for compensation for any loss sustained to any aggrieved party in relation to the register of beneficial owners. In addition, the Regulation is also not clear about the type of loss envisaged.
- 4.4. It is clear and uncontroversial as a matter of Irish trust law that, if a natural person has an entitlement, as a beneficiary, such person is entitled to bring a claim for satisfaction of their entitlements. If there has been a breach of trust, as a result of which a beneficiary has not received their due entitlement, they can compel a trustee to distribute the income and capital to which they are entitled. (Please see further paragraph 25.12 of *Trust and Succession Law*, Anne Corrigan and Ann Williams).
- 4.5. There is no reason for any additional remedy or compensation to be provided for in the Regulations, and, accordingly, the Society recommends the removal of the power to award compensation.

## ***5. Clarify whether the administration of estates of deceased persons is encompassed by the Regulations.***

- 5.1. Section 29 of the 2010 Act defines the executor or administrator of an estate as the “beneficial owner” of the estate of a deceased person in the course of administration. It is important to clarify whether this definition might carry over from the 2010 Act to the Regulations.
- 5.2. The Society notes the importance of ensuring that registration should not be required for executors, administrators of an estate and/or personal representatives of the estate of a deceased person in the course of administration. This is because, in a relatively straightforward Will or intestate estate, all of the assets pass absolutely to the persons entitled at the conclusion of the administration of the Will or estate.
- 5.3. If, however, some or all of the assets of an estate fall to be held in trust, after the completion of the administration of the estate, it is understandable that the trust arrangements subsisting from that point in time would require registration.
- 5.4. It is recommended that clarity be provided to confirm that there is no requirement of executors, administrators of estates and/or personal representatives to establish a beneficial ownership register for the estates of deceased persons.
- 5.5. From a public interest perspective, in cases of estates of modest value, their administration may be effected by the personal representatives without requiring a Grant of Probate or Letters of Administration, or professional advices. Accordingly, any obligation to establish a beneficial ownership register for the estates of deceased persons in the course of administration would be particularly onerous, inappropriate and unworkable.

## ***6. Clarify and reduce, where feasible, the onerous impact on pensions***

- 6.1. Every member of an occupational pension scheme is now a “beneficial owner” for the purposes of AML due diligence and the register of beneficial owners of trusts. This is because of the removal of the 25% threshold of entitlement. Every individual who has an interest in a “collective investment undertaking”, as defined in section 24 of the 2010 Act, is also similarly affected.
- 6.2. This is despite the fact that occupational pension schemes are generally established as trusts, in a form approved by the Revenue Commissioners, into which employers or employee beneficiaries/members have paid contributions. In addition, occupational pension schemes are already obligated to comply with onerous obligations imposed by the Taxes Acts and by virtue of the obligations required by the Pensions Board.
- 6.3. It may be unnecessarily onerous to impose on an individual, whose entitlement to the trust assets may be modest, or minute, the requirement to be regarded as a beneficial owner.

6.4. Accordingly, the Society recommends that the Department explore the possibility that simplified customer due diligence may be adequate for pensions. Article 15 of the Directive authorises a Member State to identify areas of lower risk and to allow obliged entities to apply simplified customer due diligence. In addition, Article 16 permits Member States to identify areas of low risk for which Annex 2 lists the following pensions and superannuation schemes as low risk:

“retirement benefits to employees, where contributions are made by way of deduction from wages, and the scheme rules do not permit the assignment of the members’ interest under the scheme.”

6.5. Schedule 3 of the 2010 Act replicates this approach of categorising pension-type trusts as low risk.

6.6. It is submitted that, while a beneficial ownership register in such cases is required to be established and hold relevant information, pursuant to section 28 of the 2010 Act (as amended), in relation to the settlor, trustees, protector, or any individual who has control over the trust, that simplified due diligence requirements should be sufficient in relation to the members thereof, and should be regarded as satisfied, for the avoidance of any doubt, by such information concerning the beneficiaries/members which are in the usual way obtained by such trustees, or administrators to whom that function has been delegated.

## ***7. Safeguard legal professional privilege.***

7.1. Regulation 3(3) authorises State Competent Authorities and the Revenue to timely access, on request, to a trust’s beneficial ownership register. Circumstances may arise, for example, whereby professional or legal advice is required by trustees concerning the classification of natural persons as beneficiaries, or not, as the case may be, of an express trust.

7.2. For the avoidance of any doubt, the Society recommends inserting a safeguard for legal professional privilege to ensure that access does not extend to any material which is protected by legal professional privilege.

## ***8. Future access to a centralised register of beneficial owners.***

8.1. While not dealt with in this Regulation, 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.



- 8.2. The Society understands that legal advice recently obtained by STEP and the Law Society of England and Wales indicated that access by anyone other than a State competent authority/FIU to beneficial ownership information would breach the principle of proportionality between the rights and entitlements of 5AMLD to achieve its objectives, and the competing entitlements to privacy and family life as well as the right to protections of personal data which are established by Articles 7 and 8 of the EU Charter of Fundamental Rights.
- 8.3. The Society also understands that senior individuals within the EU Commission with responsibility for data privacy have expressed concern about the proposed obligations to provide access to beneficial ownership information to anyone other than a State Competent Authority.
- 8.4. The Society urges careful consideration when developing national law to address public access.

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