

Group Briefing

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AML Update: New rules
on information about the
beneficial ownership of
corporates by individuals

KEY CONTACTS

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

BACKGROUND

The Fourth Money Laundering Directive (MLD4) was published in the Official Journal on 5 June 2015 (see our Briefing: [Fourth Money Laundering Directive published in the Official Journal](#)).

MLD4 is currently due for transposition into Irish law on 26 June 2017, despite the European Commission's recent proposal that it be transposed early (see our Briefing: [MLD4: Earlier transposition?](#)).

Certain provisions regarding beneficial ownership (by individuals) of corporates and other legal entities were transposed into Irish law this week.

This affects all Irish companies (including companies limited by guarantee) and other bodies corporate (including, for example, ICAVs and industrial and provident societies).

It is important to note that the concept of "beneficial ownership" in MLD4 differs significantly from the commonly-used and understood concept of "beneficial ownership" in company law. Under MLD4, an individual can be a beneficial owner of an entity if he directly (or indirectly through other companies) holds > 25% of the shares in that entity, or otherwise directly (or indirectly through other companies) controls > 25% of that

entity. Further, individuals who have no legal or beneficial interest in shares in an entity, but are directors or the CEO of that entity, may be deemed to be its beneficial owners if the entity cannot identify, with certainty, any other individuals who may be its beneficial owners.

EARLY TRANSPOSITION OF CERTAIN PROVISIONS

With effect from 15 November 2016, Article 30(1) of MLD4 has been transposed into Irish law, 7 months in advance of the June 2017 transposition deadline, by way of the [European Union \(Anti-Money Laundering: Beneficial Ownership of Corporate Entities\) Regulations 2016](#).

Article 30(1) requires that corporates and other legal entities incorporated in a Member State obtain, and hold "adequate, accurate and current" information on their beneficial owners.

Corporates (including companies formed and registered under the Companies Act 2014, or the previous Companies Acts) and other legal entities incorporated in Ireland (**Relevant Entities**) now must comply with this obligation, and each Relevant Entity must set up a beneficial ownership register (the **Register**).

When the remaining provisions of

MLD4 are transposed into Irish law, the information on beneficial ownership must be accessible by competent authorities, Financial Intelligence Units (FIUs), entities carrying out customer due diligence (CDD) under MLD4 and others with a legitimate interest (most likely via access to the Central Register – see further below).

WHO IS A “BENEFICIAL OWNER”?

For the purposes of MLD4 and this new obligation, a beneficial owner is **an individual who ultimately owns or controls** the Relevant Entity.

If the Relevant Entity either cannot identify an individual who is a beneficial owner, or identifies an individual who may be a beneficial owner, but cannot be certain of this, the Relevant Entity must instead list its “*senior managing officials*” (i.e. its directors and CEO) in its Register as being its beneficial owners. It must also keep a record of the steps that it took to identify its beneficial owners.

WHY IS “BENEFICIAL OWNERSHIP” A KEY FOCUS AREA?

At EU level, access to accurate information regarding beneficial ownership is seen as critical to the effective deterrence of criminal activities that could be shielded by corporate structures. The ‘*beneficial ownership*’ provisions of MLD4 are aimed at ensuring that the individuals at the top of complex ownership structures can be readily identified for CDD purposes.

WHY HAS ARTICLE 30(1) BEEN TRANSPOSED EARLY?

» *Central Register*

When MLD4 is transposed into Irish law (this is expected to happen in June 2017), Ireland must ensure that information on the beneficial owners of Relevant Entities is held in a centralised register (the **Central Register**). It is not yet clear what form the Central Register will take. The information on the Central

Register must be capable of being accessed in a “*timely and unrestricted*” manner by competent authorities and FIUs, without alerting the Relevant Entity, and those carrying out CDD under MLD4 must also be able to access the Central Register in a timely manner.

» *Populating the Central Register*

To ensure that the Central Register can be populated with information on the ultimate beneficial ownership of Relevant Entities from June 2017, Relevant Entities are being required to start collating that information now.

How that information will be passed by Relevant Entities to the operator(s) of the Central Register remains to be seen, and it has not yet been confirmed who will operate the Central Register. The set-up and operation of centralised registers, together with the preparation of related guidelines, can be a lengthy process (as has been the case with the Central Credit Register – see our Briefings [Credit Reporting Update Vol 1/2016](#) and [Credit Reporting Update Vol 2/2016](#)).

WHAT RELEVANT ENTITIES ARE OUT OF SCOPE?

Relevant Entities that are:

- » listed on a regulated market and subject to disclosure requirements that are consistent with EU law (i.e. the Transparency Directive); or
- » already subject to equivalent international standards in respect of the transparency of information on beneficial ownership,

are not within the scope of this development.

This development also does not affect express trusts governed by Irish law. A separate provision (Article 31) of MLD4 deals with the beneficial ownership of trusts, and has not yet been transposed into Irish law.

HOW IS BENEFICIAL OWNERSHIP/ CONTROL ESTABLISHED?

In establishing whether an individual is a beneficial owner of a Relevant Entity, MLD4 contemplates ownership or control existing as a result of an individual holding (whether directly or indirectly) a sufficient percentage of shares, voting rights or other ownership interests, or other forms of control, in a Relevant Entity.

As mentioned above, if the Relevant Entity either cannot identify an individual who is a beneficial owner, or identifies an individual who may be a beneficial owner, but cannot be certain of this, the Relevant Entity must instead list its “*senior managing officials*” (i.e. its directors and CEO) in its Register as being its beneficial owners, notwithstanding that they may have no ownership interests (legal or beneficial) in the Relevant Entity.

» *Indicators of direct ownership*

If an individual holds 25% plus one share in a Relevant Entity, or another form of ownership interest exceeding 25% in a Relevant Entity (perhaps by way of controlling voting rights in a Relevant Entity that does not have a shareholding structure, such as a company limited by guarantee), that will indicate direct ownership and that individual will be a beneficial owner.

» *Indicators of indirect ownership*

If a company or companies controlled by an individual together hold more than 25% of the shares, or other ownership interest exceeding 25%, in a Relevant Entity, that will be indicative of indirect ownership (i.e. indirect interests can be aggregated) and that individual will be a beneficial owner.

While Member States have discretion to decide that a lower percentage than 25% should be used as the threshold, Ireland has not done so.

WHAT MUST RELEVANT ENTITIES DO NOW?» *Establish their beneficial owners*

KNOWLEDGE	STEP TO BE TAKEN
If the Relevant Entity has been told that an individual is a beneficial owner of that Relevant Entity:	If the Relevant Entity was given that information, and the necessary details, by or on behalf of the beneficial owner itself, the Relevant Entity should enter the necessary details on the Register.
If the Relevant Entity has reasonable cause to believe that an individual is one of its beneficial owners:	The Relevant Entity must give that individual a notice asking him to confirm whether he is a beneficial owner and, if he is, asking that he confirm or correct the details included in the notice. The notice must state that the individual must comply within 1 month.
If the Relevant Entity believes that someone else has information about either: <ul style="list-style-type: none"> » one of the Relevant Entity's beneficial owners; or » another person who may have information about one of the Relevant Entity's beneficial owners: 	The Relevant Entity may serve a notice on that person looking for that information (and the recipient may justify non-disclosure on the basis of legal professional privilege, if relevant).

» *Obtain information, enter it on the Register and keep the Register up-to-date*

AREA	ACTION
OBTAINING INFORMATION:	The Relevant Entity must ensure that it obtains the following information in respect of each beneficial owner (see the above table for details on how a Relevant Entity should do so): <ul style="list-style-type: none"> » name; » date of birth; » nationality; » residential address; and » statement of nature and extent of interest held by that beneficial owner.
RECORDING INFORMATION:	The Relevant Entity must enter the following information in the Register in respect of each beneficial owner: <ul style="list-style-type: none"> » name; » date of birth; » nationality; » residential address; » statement of nature and extent of interest held by that beneficial owner; » the date on which that person was entered in the Register as a beneficial owner; and » if applicable, the date on which that person ceases to be a beneficial owner.
UPDATING INFORMATION:	If the Relevant Entity believes that an individual has ceased to be a beneficial owner, or a beneficial owner's particulars on the Register have changed, the Relevant Entity must give notice to that individual, seeking confirmation as to whether the change has occurred (unless it has already been informed of the change by or on behalf of that individual).

The new regulations set out further detail in relation to what notice sent by Relevant Entities should contain.

ARE OBLIGATIONS IMPOSED ON INDIVIDUALS?

Yes, as set out below.

Individual not already listed in Register as beneficial owner:

If an individual is the beneficial owner of a Relevant Entity and knows (or ought to know) that this is the case, and:

- » his details are not in the Register maintained by that Relevant Entity;
 - » he hasn't received a notice from the Relevant Entity seeking information from him; and
 - » this has been the case for at least 1 month after the new regulations came into force,
- he must inform the Relevant Entity that he is a beneficial owner and confirm:
- » the date on which he became a beneficial owner; and
 - » the details that the Relevant Entity needs for inclusion on the Register.

Individual already listed in Register as beneficial owner:

If an individual is a beneficial owner of a Relevant Entity, is listed as such in the Register maintained by the Relevant Entity and either ceases to be a beneficial owner or an event occurs that would render the information held about him on the Register either incomplete or inaccurate, he must also notify the Relevant Entity of that fact.

The new regulations set out further detail in relation to what notice sent by beneficial owners should contain.

SANCTIONS

Failure by a Relevant Entity to comply with any requirement of the new regulations regarding obtaining and holding information on beneficial ownership, creating and maintaining the Register, serving notice on individuals believed to be beneficial owners and confirming any change in a beneficial owner's details is a criminal offence.

It is also a criminal offence for an individual to fail to comply with his obligations under the new regulations (these are set out above), to fail to comply with the terms of a notice that he receives from a Relevant Entity, or to provide materially false information in response to such a notice.

NEXT STEPS AND HOW WE CAN HELP YOU

Our Company Compliance and Governance Group can work with Relevant Entities to assist them in meeting their new legal obligations, to include:

- » creating and maintaining a Register for each of the companies in each Relevant Entity's group;
- » advising Relevant Entities on the steps necessary to obtain the requisite information on its beneficial owners and those of the other companies in its group;
- » drafting and issuing the statutory notices prescribed by law to be sent to persons suspected of being beneficial owners;
- » drafting and issuing the statutory notice prescribed to be sent where a change in particulars is known or suspected;
- » issuing reminders of the Relevant Entity's obligations at agreed intervals; and
- » preparing the necessary board resolutions to authorise the foregoing actions.

If you are a Relevant Entity and wish to discuss your new obligations and how we can assist you in complying with them, please contact Tom Courtney, Head of our Company Compliance and Governance Group, or your usual contact in that Group. It is important to realise that the new requirements are now in force and effect and immediate action is required.

OTHER DEVELOPMENTS***Irish consultation on MLD4***

While the Department of Finance consulted on national discretions in MLD4

in January 2016 (with the consultation closing in March 2016), it has not yet confirmed how it intends to proceed based on the feedback received. Notably, in the area of beneficial ownership of Relevant Entities, it had sought views as to whether access to the Central Register should be open to the wider public.

Status of MLD5 proposals

As signalled in our July 2016 Briefing, MLD4: Earlier transposition? the Commission proposed further changes to MLD4 (those changes are now commonly referred to as MLD5).

The proposal for an earlier transposition date for MLD4 in January 2017 has not received support at an EU level. The EU Council supports the MLD4 transposition date remaining as 26 June 2017 (with the MLD5 amendments coming into force at the same time), and a committee vote in the European Parliament on its draft report on MLD5 is not scheduled until 25 January 2017 (after the Commission's proposed earlier transposition date).

Notably, among the changes proposed by MLD5 (in response to the Panama Papers scandal) is a proposal that public access be granted to information on the beneficial ownership of companies and trusts engaged in business activities. Information on other trusts will be available to those with a legitimate interest. The threshold for the information being publicly available would remain >25% ownership of a company, save in the case of companies that present a real risk of being used for money laundering and tax evasion, in which case the threshold would be reduced to 10%.

As such, Relevant Entities should bear in mind that the new regime regarding beneficial ownership may be subject to further amendments in the coming months.

We will provide further updates as the MLD5 proposal progresses.

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