

FINANCIAL REGULATION
CORPORATE GOVERNANCE AND COMPLIANCE
PENSIONS AND EMPLOYEE BENEFITS

AML Update: Express Trusts and Beneficial Ownership – Welcome Clarity

May 2021

The transposition of the Fifth Money Laundering Directive (**MLD5**) into Irish law last month brought with it welcome clarification on the scope of the Irish framework for the beneficial ownership of express trusts.

Most of MLD5 was [transposed into Irish law on 18 March 2021](#), and came into force on 23 and 24 April 2021. Our recent briefings contain detailed analysis on Ireland's updated anti-money laundering (**AML**)/countering the financing of terrorism (**CFT**) framework: [Arthur Cox Q&A: MLD5 Transposition and AML Horizon-Scanning and AML Update: Crypto-Assets – VASPs must register with Central Bank](#).

CONTEXT

The Fourth Money Laundering Directive (**MLD4**) as amended by MLD5 requires EU Member States to:

- oblige trusts to establish registers of their beneficial owners (**Beneficial Ownership Registers**)
- establish a central register of beneficial ownership for trusts (a **Central Register**).

Preliminary steps were taken in Ireland in January 2019, when the Department of Finance published [Regulations](#) (the **2019 Regulations**) requiring trustees of express trusts to collate information on the beneficial owners of those trusts and to establish Beneficial Ownership Registers. Further details on the 2019 Regulations were set out in our 2019 briefing: [Express Trusts: Trustees must now set up Beneficial Ownership Registers](#).

RECENT DEVELOPMENTS

The Minister for Finance (the **Minister**) has made further [regulations](#) (the **2021 Regulations**) that deal with the establishment and operation of the Central Register by the Revenue Commissioners (the **Revenue**) and replace the 2019 Regulations. The 2021 Regulations also:

- clarify what is meant by an “*express trust*”;
- clarify which express trusts are out-of-scope;
- clarify what is meant by a “*beneficial owner*” of an express trust; and
- increase the information that a trustee is required to obtain and hold in respect of beneficial owners.

WHAT IS AN EXPRESS TRUST?

Like the 2019 Regulations which they replace, the 2021 Regulations deal only with express trusts. The 2021 Regulations clarify that, for the purposes of the Irish beneficial ownership framework, an express trust is one:

- that is “*established by deed or other declaration in writing*”; and
- whose trustees are resident in Ireland or which is otherwise administered in Ireland.

If none of the trustees of an express

trust that is “*established by deed or other declaration in writing*” are resident in the EU, and if that trust is not administered in the EU, the 2021 Regulations can still apply where the trustee (in its capacity as trustee of the express trust):

- enters into a business relationship in Ireland; or
- acquires Irish real estate in the trust's name,

for as long as that business relationship remains in place or that real estate is held by the trustee.

Express trusts that continue to fall within the scope of the 2021 Regulations include certain express trusts frequently encountered in corporate and finance transactions, such as private family trusts, security trust arrangements, and declarations of trust in respect of shares.

Exclusions

As mentioned in our [recent briefing](#), occupational pension schemes, approved retirement funds and employee share schemes are outside the scope of the 2021 Regulations. Other types of express trust may be included or excluded from this framework at a later date by way of regulation.

Separately, investment funds established as unit trusts are now subject to the beneficial ownership framework for

certain financial vehicles where the central register is managed by the Central Bank of Ireland (CBI). In light of that, while unit trust funds were initially within the scope of the 2019 Regulations, the 2021 Regulations no longer refer to them.

WHO ARE THE BENEFICIAL OWNERS?

For the purposes of the 2021 Regulations, the following are the beneficial owners of an in-scope express trust:

- any individual entitled to a vested interest of any nature (present or future) in the capital of the relevant trust fund (or the class of individuals in whose interest the trust operates);
- the settlor;
- the trustee;
- the protector; and
- any individual who has “control” over the trust.

“Control” means the power to deal with the trust property, vary the terms of the trust, add or remove beneficiaries, appoint or remove trustees, or control how such powers are exercised. “Control” can be exercised alone, jointly, or with the consent of another person.

In certain cases, the scope of “beneficial owner” is more limited:

- **trusts of amateur sports/games clubs and associations:** the trustees, the committee/other governing body, and any other individual who has “control” over the trust;
- **charitable trusts:** the trustees, the committee/other governing body, and any other individual who has “control” over the trust;
- **trusts for beneficiaries of the estate of a deceased person that is in the course of administration:** the executor/administrator.

Key Point to Note

Under the 2019 Regulations, an individual exercising ultimate control over an express trust, whether by direct ownership, indirect ownership or other means was included in the definition of “beneficial owner”. That limb of the “beneficial owner” definition from the 2019 Regulations was not carried through to the 2021 Regulations. This would appear to impact the steps that the trustee must take where a “beneficial owner” of a relevant trust is a legal entity. See ‘Where the beneficial owner is a legal entity’ below.

INFORMATION ON BENEFICIAL OWNERSHIP

Obtaining the Information

A trustee must take “all reasonable steps” to obtain and hold accurate, adequate and current information on the trust’s beneficial owners. This has been the case since the introduction of the 2019 Regulations however, the information required by the 2019 Regulations was limited to the name, date of birth, nationality and residential address of each beneficial owner. The 2021 Regulations go further and require trustees to also obtain:

- a statement of the nature and extent of the interest held/control exercised by the beneficial owner; and
- the beneficial owner’s PPS number (or, where the beneficial owner is resident in a country other than Ireland, a unique tax number, passport number or national identity card number from that jurisdiction).

As regards PPS numbers (or their equivalent), the trustee may not disclose these, or add them to the trust’s Beneficial Ownership Register.

Where definitive information on the trust’s beneficial owners is not readily available to the trustee, the 2021 Regulations include:

- a **requirement** that the trustee give a notice to any individual that the trustee has reasonable cause to believe is a beneficial owner of the trust (a **Regulation 9 Notice**);
- an **option** for the trustee to give a notice to any person that it has reasonable cause to believe may know the identity of a beneficial owner (a **Regulation 11 Notice**);
- a **requirement** for the trustee to give a notice to a beneficial owner where the trustee learns of a change in the particulars of that beneficial owner that are contained in the Beneficial Ownership Register, or has reasonable cause to believe that such a change has occurred (a **Regulation 13 Notice**).

Where a beneficial owner is a legal entity

Where a beneficial owner is a legal entity, details of its beneficial owners are likely to already be recorded in either the Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies maintained by the Companies Registration Office (CRO), the Central Register of Beneficial Ownership of Irish Collective Asset-management Vehicles,

Credit Unions and Unit Trusts maintained by the CBI, or an equivalent central register in another EU Member State.

If that is the case, the trustee need only obtain and hold the following information in respect of the legal entity:

- its name, registered office and a statement of the nature and extent of the interest held/control exercised by it in relation to the trust;
- the filing number given to it by the registrar of the central register referred to above.

If details of the legal entity’s beneficial ownership are not recorded in one of the above registers (perhaps because the legal entity is based in a non-EU Member State), the 2021 Regulations oblige the trustee to obtain information on the individuals who are beneficial owners of the trust through that legal entity. However, as the 2021 Regulations did not carry over, into the definition of “beneficial owner” the concept of an individual exercising ultimate control over an express trust (whether by direct ownership, indirect ownership or other means), it is unclear if an individual who controls a relevant trust via a legal entity is a “beneficial owner”. It is possible that the Department of Finance intended to require trustees to obtain information on the beneficial owners of the legal entity itself. Trustees would benefit from clarification on that point, perhaps by way of amending Regulations.

The Beneficial Ownership Register

As was the case under the 2019 Regulations, the trustee of an in-scope trust must:

- set-up a Beneficial Ownership Register;
- enter all of the above information (except for PPS numbers or their equivalents) on that register together with the date on which each beneficial owner’s details were entered on that register; and
- keep that register up-to-date (including by entering the date on which a beneficial owner ceases to be a beneficial owner).

Trustees of express trusts have been required to set up Beneficial Ownership Registers since January 2019. However, the requirement to include, in respect of each beneficial owner, a statement of the nature and extent of the interest held/control exercised by it is new, so trustees will need to update their existing registers to include that additional information.

As was the case under the 2019 Regulations, a person aggrieved by the

inclusion or omission of its name from a trust's Beneficial Ownership Register, or by a delay in updating that register to confirm that it has ceased to be a beneficial owner, may apply to the High Court to have the trust's Beneficial Ownership Register rectified. The High Court is also empowered to award compensation for any loss suffered by that person.

Access to Beneficial Ownership Registers

The trustee must grant timely access to an in-scope trust's Beneficial Ownership Register, on request, to any member of the Garda Síochána, the Revenue, a competent authority (as defined in Irish AML/CFT legislation) or the Criminal Assets Bureau (CAB) each of whom may, in turn, disclose the information on that register to their counterparts in another EU Member State on request.

Trustee dealings with a “designated person”

If the trustee enters into a transaction or business relationship on behalf of the trust with a designated person (i.e. a person who is required to carry out customer due diligence (CDD) on the trust under Irish AML/CFT legislation), the trustee must tell the designated person that it is acting as trustee, provide information on the beneficial ownership of the trust, and notify the designated person within 14 days of becoming aware of changes to that information.

OBLIGATIONS ON BENEFICIAL OWNERS

Notification of Status

If an individual is a beneficial owner of an in-scope trust (and knows or ought reasonably to know that this is the case), it must notify the trustee of its status if its details are not already in the trust's Beneficial Ownership Register and if it has not received a Regulation 9 Notice.

Notification of Change

If any of the particulars listed in a trust's Beneficial Ownership Register in respect of one of its beneficial owners has changed, that beneficial owner (provided that it is aware of the change, the register has not already been updated, and it has not received a Regulation 13 Notice from the trustee) must notify the trustee of the change.

In each case, time limits apply.

CENTRAL REGISTER OF BENEFICIAL OWNERSHIP

Establishment

The 2021 Regulations confirm that the Revenue is to appoint a Registrar of Beneficial Ownership of Trusts (and may also appoint assistant registrars). The Central Register will now be established, and will be maintained by the Registrar.

Submitting information to the Central Register

At the date of writing, the Revenue has not yet published details of the establishment and operation of the Central Register. When it becomes operational:

- trustees of in-scope trusts that were already in existence on 23 April 2021 will have until 23 October 2021 to deliver beneficial ownership information to the Registrar;
- trustees of in-scope trusts established after 23 April 2021 will have 6 months from coming into existence to deliver beneficial ownership information to the Registrar;
- a designated person who believes that there is a discrepancy between the beneficial ownership information held on the Central Register and the information contained in the relevant trust's Beneficial Ownership Register must notify the Revenue and the Revenue will then liaise with the trustee to resolve the matter.

What information must be submitted to the Central Register?

The following must be submitted by the trustee or by a presenter acting on behalf of the trust:

- the name, date of birth, nationality and residential address of each beneficial owner;
- a statement of the nature and extent of the interest held/control exercised by the beneficial owner;
- where the trust is set up for the benefit of a class of individuals rather than specific individuals, information on the class of individuals.

Where a beneficial owner is a legal entity whose beneficial ownership information is already held by the CRO or the CBI (or its equivalent in another EU Member State), the trustee need only submit details of:

- the entity's name and registered address;

- a statement of the nature and extent of the interest held/control exercised by it;
- the filing number assigned to it by the CRO, CBI or equivalent.

The trustee must also deliver the PPS number of each beneficial owner (or equivalent number (as discussed above) in respect of a beneficial owner resident in a country other than Ireland), but these will not be included on the Central Register and must be stored securely by the Registrar.

Where a trustee updates a trust's Beneficial Ownership Register, it must deliver information on that update to the Registrar.

Where beneficial ownership information on a trust is already registered with a corresponding registrar in another Member State, then (provided that the information registered in the other EU Member State is the same as the information that the trustee would be required to file in Ireland) the 2021 Regulations allow the trustee to procure and hold a certificate from that other registrar confirming that the beneficial ownership information has been filed with them. The trustee will not then be required to file the same information with the Central Register.

Who can access the Central Register?

Certain members of the Gardaí, FIU Ireland (Ireland's Financial Intelligence Unit), the Revenue and the CAB have a right to inspect the Central Register. They may share the information they gather from the Central Register, on request, with their counterparts in other EU Member States. As mentioned above, these organisations can also inspect an in-scope trust's Beneficial Ownership Register. If they identify possible discrepancies between the information held in a trust's Beneficial Ownership Register and the information held on the Central Register in respect of that trust, they must (provided that it does not unnecessarily interfere with the performance of their functions) notify the Registrar.

Other Competent Authorities

A staff member or officer of another competent authority (such as the CBI, Minister for Justice, Property Services Regulatory Authority, Legal Services Regulatory Authority, Law Society of Ireland, General Council of the Bar of Ireland or a designated accountancy body) may also request access provided that certain conditions are met.

Access for designated persons and others

A designated person entering into an occasional transaction or business relationship with the trustee of an in-scope trust (in its capacity as trustee of that trust) or who is otherwise carrying out CDD on that trust will have a right of access to more limited information in respect of the trust’s beneficial owners:

Any other person who can demonstrate that they have a legitimate interest in accessing the information on the Central Register may also request access – the bar for such access will be relatively high and must relate to that person’s AML/ CFT activities. A person can also request access if the trust holds a controlling interest in a non-EU legal entity.

There are restrictions on when that information can be accessed in respect of minors (the person seeking access must be able to demonstrate a public interest ground for its request to the Revenue). The protections afforded by the Data Protection Act 2018 will also apply.

Fees for Access

While fees (reflecting the administrative cost to the Registrar) may be charged for accessing the Central Register, details of those fees are not yet available.

WHAT HAPPENS NEXT?

Trustees of many express trusts have been complying with the obligation to obtain and hold information on the trust’s beneficial owners since 2019. However, in light of the 2021 Regulations, some express trusts may now be out-of-scope. Further, where a trust is in-scope, additional information will now need to be sought, and further steps taken to identify beneficial owners where that information is not already available.

A failure by a trustee to comply with any of the key provisions of the 2021 Regulations is a criminal offence, as is a failure by a beneficial owner to notify the trustee of its status (or of a change in its status) as outlined above.

We will publish a further update once details of the Central Register and the procedures for filing beneficial ownership information are confirmed. In the meantime, we can assist trustees in assessing the impact of the 2021 Regulations on their existing Beneficial Ownership Registers.

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