

BENEFICIAL OWNERSHIP OF IRISH COMPANIES

What has happened?

Regulations recently signed into law mean that most Irish companies must gather information on individuals who are their underlying beneficial owners. The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (the “**2016 Regulations**”) took effect on 15 November 2016 and companies should act now to ensure that they comply with the new measures. Failure to comply with the 2016 Regulations is a criminal offence.

It is likely that this beneficial ownership information will become publicly accessible when related measures concerning a central register of beneficial ownership come into force later this year. The new law affects Irish incorporated legal entities such as companies and ICAVs (but not trusts which will become subject to similar regulation in mid-2017).

Shareholder privacy

Until the introduction of the 2016 Regulations, the identity of the beneficial owners of Irish companies could remain largely private and so the new obligations represent a significant development for certain companies and their ultimate beneficial owners. The 2016 Regulations came about as a result of an EU directive (the Fourth Anti-Money Laundering Directive (“**4AMLD**”)) in part aimed at increasing transparency in relation to the real ownership of corporate vehicles. The UK government introduced similar measures in 2016 with the establishment of the PSC Register (a public register of persons with “significant control” over a company) and must now adapt the PSC regime to bring it into line with 4AMLD. It is interesting to note that detailed statutory guidance was issued in the UK in conjunction with the introduction of the PSC regime which was not the case with the 2016 Regulations.

The deadline for transposing 4AMLD into Irish law is 26 June 2017 but Ireland acted early on elements of the directive to give companies time to comply with their information-gathering obligations.

Analysis of ownership structures

In many cases, where the legal owners and beneficial owners of a company are the same, the 2016 Regulations are unlikely to prove controversial or to cause difficulty. The Department of Finance has acknowledged, however, that there are many complex company ownership structures in place where determining who the underlying beneficial owners are will not be a simple task and that the new regulations will necessitate in-depth legal analysis of their ownership structures. For some companies, the ownership structure may be very dilute and there may not in fact be a particular beneficial owner.

Who is a beneficial owner?

A “beneficial owner” is defined as the individual(s) who ultimately owns or controls a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity.

A shareholding of 25% plus one share or an ownership interest of more than 25% in the entity held by an individual is an indication of direct ownership. A shareholding of 25% plus one share or an

ownership interest of more than 25% in the entity held by a corporate entity, which is under the control of an individual(s), or by multiple corporate entities, which are under the control of the same individual(s), is an indication of indirect ownership.

Central register

Over the coming months, we can expect to see further Irish measures to fully transpose 4AMLD. All EU member states must establish central registers of beneficial ownership information in relation to the corporate and other legal entities in scope. In Ireland, this central register is likely to be kept by the Companies Registration Office. Competent authorities and financial intelligence units, entities carrying out customer due diligence and those who can demonstrate a “legitimate interest” in the ownership information will be able to access the central register.

In terms of public access generally, much will depend on the approach of the Irish government to discretions given to member states in 4AMLD as to those entitled to view beneficial ownership information. Recent developments at EU level (in the form of a proposed amendment to 4AMLD) indicate that this public access discretion may be removed resulting in open access to beneficial ownership information.

Exclusions

Certain companies are excluded from the scope of the 2016 Regulations:

- Those listed on a regulated market that is subject to disclosure requirements consistent with the law of the EU (including transparency regulations)
- Those subject to equivalent international standards which ensure adequate transparency of ownership information.

The 2016 Regulations do not exempt Irish incorporated subsidiaries of listed companies.

Corporate entities to keep “beneficial ownership register”

Entities in scope must take all reasonable steps to obtain and hold “adequate, accurate and current” information on their beneficial ownership: the name, date of birth, nationality and residential address of each beneficial owner and a statement of the nature and extent of the interest held by each such beneficial owner. This information must be held in a new “beneficial ownership register”. Failure by a relevant entity to keep such a register is a criminal offence and can result in a fine of up to €5,000. The Irish High Court has the power to order rectification of the register and can determine disputes as to whether a party in fact holds a beneficial interest.

In the context of obtaining information, where all possible means for determining the beneficial owner have been exhausted by a relevant entity to no avail and, provided there are no grounds for suspicion by the relevant entity, or in circumstances where there is any doubt that any individual so identified is a beneficial owner of the relevant entity, the names of the senior managing officials of the relevant entity (including directors and the chief executive officer) must be added to the register instead, even where those senior managing officials do not hold an interest (legal or beneficial) in the relevant entity.

Entities must keep records of the actions they take to establish the identity of their beneficial owners. At present, no statutory inspection rights are set out in relation to beneficial ownership registers.

Entities must keep the beneficial ownership register up to date. The 2016 Regulations give no guidance on the frequency with which an entity must check to see that ownership information is "current".

Notices

Where a corporate entity does not already have details of its beneficial owner (supplied by the beneficial owner or with his or her knowledge), it *must* give notice to any individual whom it reasonably believes to be its beneficial owner. Once such a notice has issued, the individual assumed to be a beneficial owner has one month to reply. Failure by an individual to comply with this requirement is a criminal offence.

A corporate entity *may* issue a similar notice to a third party which it has reasonable cause to believe knows who the corporate entity's beneficial owner(s) are. The 2016 Regulations contain a limited form of safeguard which permits non-disclosure of information where any claim to legal professional privilege could be maintained in legal proceedings.

Importantly, an individual who is a beneficial owner or who ought to know that they are one must notify the corporate entity of which they are a beneficial owner if they have not received a notice from the entity requesting this information. The 2016 Regulations include procedures governing notifications and communications about changes in beneficial ownership between corporate entities and their beneficial owners.

Trusts

For trusts, similar measures will be brought into force when 4AMLD is fully transposed in 2017. An equivalent beneficial ownership register will apply to trusts that generate "tax consequences".

Submissions

The manner in which the 2016 Regulations were transposed into Irish law left open a number of ambiguities and technical difficulties which Matheson has been seeking to have addressed by the Department of Finance.

Further information

If you would like to discuss the impact that these new measures have on your organisation, please get in touch with your usual Matheson contact.

April 2017

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