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11 March 2016

Re: Public consultation on Member States discretions re Fourth Anti-Money Laundering Directive

Dear Sir/Madam

The Irish Tax Institute welcomes the opportunity to comment on the transposing of the Fourth AML Directive (4AMLD) into Irish law. We are supportive of the overall aims of the AML package.

Overview

We outline below our comments in relation to aspects of:

A. Article 31 – Beneficial ownership information in relation to express trusts.

While the term “express trust” is not defined in the Directive, we take this to mean trusts created voluntarily and intentionally by a settlor and our comments are made on this basis.

1. Obtaining and holding up-to-date information on beneficial owners

Article 31(1) and (2) require that trustees of any express trust obtain and hold adequate, accurate and up-to-date information on the identities of the beneficial owners of the trust and provide this information to obliged entities (e.g. financial institutions), in a timely manner where a business relationship has been formed.

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It is important that trustees are aware of the identities of the parties to the trust and we outline below our comments on a practical approach to ensuring that information is up-to-date.

2. *The circumstances when information is to be provided to a central register*

Article 31(3) requires Member States to allow Competent Authorities and Financial Intelligence Units (FIU) access to the trust information. To facilitate this, Article 31(4) requires that this information is held on a central register, but only in the case of trusts which “generate tax consequences”. Information on the beneficial ownership of trusts which do not generate tax consequences will be available to Competent Authorities and FIUs on request.

It is important that trustees have clarity about the types of trusts where they will/will not have an obligation to provide information to the central register. Rather than considering a comprehensive list of the categories of trusts which may generate tax consequences, it may be more useful to identify trusts which **do not generate tax consequences**. We outline examples of these types of trusts below.

We also highlight areas where there will be an overlap between information to be provided to the central register and information already held by Revenue and other government authorities.

3. *Access to the central register by obliged entities*

Article 31(4) also proposes that Member States **may** allow obliged entities to access information on the central register. It is not fully clear what added value can be provided by allowing obliged entities access to the register since trustees must provide information on the identities of the beneficiaries of the trust directly to these obliged entities for customer due diligence purposes, under Article 31(2).

4. *Procedures for ensuring information on the central register is adequate, accurate and up-to-date*

Article 31(5) states that the information held on the register is kept up to date. We outline below a suggested approach for implementation of this requirement in practice.

5. *The application of the procedures to legal arrangements similar to trusts*

Article 31(8) states that the Directive also applies to “other arrangements” which have a structure or function similar to trusts. Clarity would be welcome as to what other arrangements would fall within the scope of the measures as enacted in Ireland.

B. Article 30 – Beneficial ownership information in relation to corporate and legal entities.

Our comments on Article 30 are focused on access to the register of beneficial ownership of corporate and legal entities. In particular whether there should be public access to the register.

A. Article 31 – Beneficial ownership information in relation to express trusts.

1. Obtaining and holding up-to-date information on beneficial owners

As noted above, Article 31(1) and (2) require that trustees of any express trust obtain and hold adequate, accurate and up-to-date information on the identities of the beneficial owners of the trust and provide this information to obliged entities (e.g. financial institutions), in a timely manner where a business relationship has been formed.

In our view, trustees should be required to take a risk-based approach to ensuring the information they hold is up-to-date. This might be achieved by requiring trustees to review the information they hold within a reasonable timeframe of the happening of certain events for example: a change in the identity of beneficiaries under the trust, the winding up of the trust etc.

2. The circumstances when information is to be provided to a central register

Trusts are used widely for legal reasons and commercial purposes. In family situations, they are established mainly for asset protection reasons, with the age or personal circumstances of beneficiaries being influencing factors. They are used in corporate situations in a range of complex commercial situations and commonly arise in the charity sector also.

The Directive is framed very broadly without specific definitions as to what express trust arrangements are within the scope of the Directive - this being a matter for Member States.

There will be:

- a) Trusts which **do not generate** tax consequences. As highlighted above, the trustees are not obliged to provide information on these trusts to the central register (under Article 31(4)) but must make this information available to Competent Authorities and FIUs on request.
- b) Trusts which **generate** tax consequences. Information on the beneficial ownership of these trusts must be provided to the central register.

Given that there will be costs associated with collating, administering and providing information to maintain a central register, it is important that there is clarity on the trust arrangements that fall within each category. It is also important that the benefits of centrally holding the information can be realised in Ireland in a manner which is proportionate to the costs of administration.

a) Trusts which do not generate tax consequences

Tax – exempt trusts

Some categories of express trusts will never have tax consequences as they are specifically exempt from tax on income and gains which arise within the trust. This exemption is generally conditional upon the trust obtaining Revenue approval of its exempt status, for example, in the case of charitable trusts, trusts for incapacitated persons or pension fund trusts.

Certain unit trusts (for example, collective investment undertakings) also have tax exempt status. This exemption is derived from their status as regulated funds.

In the case of exempt unit trusts under section 731, TCA 1997, the tax exempt status applies where the unit holders are themselves tax exempt entities e.g. pension funds and insurance companies collectively holding assets under the unit trust arrangement.

Trusts in these categories must operate within prescribed guidelines in order to maintain their tax exempt/regulated status. This should mean that there is limited scope for assets held under these tax exempt trust arrangements to be used other than for approved purposes. In any case, these trusts will never have a tax consequence while they have tax exempt status.

Once the Directive is transposed, it should be made clear in guidelines and supporting information that there is no requirement to provide information on tax-exempt trusts to the central register, once their tax-exempt status is maintained.

Bare trusts

As noted above, Irish trust arrangements are used for a broad range of commercial purposes. These include trust arrangements which can be described as 'bare trusts', where the trustee holds the asset at the direction of the beneficiary. The settlor and the beneficiary are always the same person.

Such trusts may be said to not generate tax consequences because:

- a) No tax consequences arise when an asset is placed under the trust arrangement.
- b) The trust arrangement is effectively ignored for tax purposes and income/gains arising on the assets are taxed on the beneficiary.

A range of tax information reporting requirements already apply which provide Revenue with information on the beneficiaries and assets held under such arrangements. This ensures collection of tax from the beneficiaries in the event that the beneficiaries do not report taxes on the income and gains.

Some bare trust arrangements operate in a very narrow context which may provide information with limited usefulness for AML purposes. These include:

- Trust arrangements in place to enforce creditor obligations in financing and lease arrangements. A security trustee is appointed to hold assets and act in the event of borrower/lessee default to enforce creditor rights of the lender/lessor.
- Trusts in place under Revenue approved share scheme arrangements under section 128D, TCA 1997 which apply to enforce 'clogs' and other restrictions in place over shares held for employees.
- Holdings of shares as nominee for other group members which are the beneficial owners in corporate groups e.g. where there is a legal requirement for a company to have more than one member. These types of trust arrangements might be dealt with in the course of tracing through the ownership structure of companies in the context of the beneficial ownership information held on the corporate register.

Collating the beneficial ownership information on nominee holding arrangements (a category of bare trust) on a central register may provide information of limited use to obliged entities. This information will not include any details on the source of the wealth, solely on the identity of the beneficiaries.

The ability to aggregate details of trust arrangements for specific beneficiaries may well be of greater use to Financial Intelligence Units (FIUs) and Competent Authorities in forming a picture of the combined range of trust arrangements for a specific beneficiary.

Clarity would be welcome as to whether and to what extent bare trusts and nominee arrangements are to be included in the central register.

b) Trusts which generate tax consequences

The consultation paper envisages that a tax consequence could be generated where, for example, there is:

1. Receipt by the trustees of income or capital gains.
2. Disposal of income or capital assets by the trust.
3. Movement of funds by the trust.

The guidelines should make it clear that not all movement of funds will result in a requirement to provide information to the central register. The obligation to report will only arise where the movement of funds gives rise to a tax consequence.

Certain types of trusts such as discretionary trusts can be said to generate tax consequences as assets 'move through' the trust i.e. as assets transfer from settlor to trustee and further transfer from trustee to beneficiaries. Many of these trust arrangements operate in a range of family circumstances and serve to provide an environment for the protection and administration of assets for a class of beneficiaries. It is welcome that information on beneficiaries under such arrangements is to be held in a robust and confidential environment.

In the case of some discretionary trust arrangements (such as will trusts) information on assets and beneficiaries under the trust is already available in the Probate Office. As such, consideration might be given as to whether it is necessary in the case of such trusts to also require that this information is provided to the central register.

Information on Irish trusts is already made available to government authorities through our tax framework. It would be useful to review what steps can be taken to minimise the current administration burden in complying with these requirements, in light of the additional reporting obligations under the Directive.

3. Access to information on the central register by obliged entities

Article 31(4) also provides that Member States "*may also allow timely access {to the central register} by obliged entities, within the framework of customer due diligence..*".

Under Article 31(2), trustees of **any** express trust will already be required to provide the relevant information to obliged entities for due diligence purposes. In addition, the information on the register will be of limited use in carrying out due diligence obligations under the Directive, as the information is limited to the identity of the parties to the trust. As such, it is not clear what additional value will be realised by allowing obliged entities access to the central register.

If it is decided to allow obliged entities access the central register, it is important to ensure that they only have access to the information on trusts where there is an appropriate business relationship in place, in the interests

of confidentiality. They do not need to have access to information on all the trusts on the register to carry out their due diligence obligations under the Directive.

4. *Procedures for ensuring information on the central register is adequate, accurate and up-to-date*

The information on the central register is required to be adequate, accurate and kept “up to date”.

In assessing the timing of reporting of information to be held on the central register for trusts under Irish law, it is suggested that trustees should be required to adopt a risk-based approach. This might be achieved by requiring trustees to report to the central register within a reasonable timeframe of the happening of an event which triggers a reporting obligation, such as: the establishment of the trust, a change in the identity of beneficiaries under the trust, and on the winding up of the trust. Consideration might be given to excluding from the scope of reporting to the central register details of beneficiaries who are entitled to de minimis values of assets (e.g. in line with the monetary thresholds set out in Article 11).

Other relevant matters in relation to trusts

Some regulated funds are more akin to a corporate form than a trust, for example, in the case of authorised unit trusts under the Unit Trust Act 1990 which are regulated funds. Consideration might be given to treating these forms of trusts in the same manner as companies and including beneficial information on these funds in the corporate register in the same way as regulated funds in corporate form e.g. including details on the corporate register of individuals who hold a 25% interest in the fund.

B. Article 30 – Beneficial ownership information in relation to corporate and legal entities

The consultation paper seeks views on the level of access to the register of beneficial ownership of corporate and legal entities. In particular, it asks whether and to what extent information on the central register should be publicly available.

It is important that information on the register is accessible to Competent Authorities and FIU to enable them prevent the misuse of business entities. However, it is not clear to us what benefits would be realised by allowing public access to this confidential information. Confidentiality is a cornerstone of our business framework.

Under Article 30(9), Member States may provide an exemption from public access to all or part of the information held on the central register for corporates on a case by case basis in exceptional circumstances. In our view, this discretion should be exercised and these exceptional circumstances should also include “any other circumstances that could justify an exemption”. A similar exception is available in the United Kingdom under the new requirements regarding a register of persons with significant control under Part 21A of the Companies Act 2006.

In the case of some companies, the ultimate ownership may be held under trust arrangements. Consideration should be given to treating the information held on the corporate register relating to the beneficial owners under trust arrangements in like manner to the disclosure requirements applying under Article 31(4) in relation to trusts and providing access to such information on the corporate register to Competent Authorities, FIUs and obliged entities. This would seem to be a proportionate implementation of the Directive’s requirements balancing the AML aims of the Directive with rights of individuals to privacy,

security and data protection. It also provides for consistency of treatment of information on trusts in the context of both central registers.

Conclusions

In conclusion, in relation to trusts:

- There should be no requirement to provide information to the central register when a trust is tax-exempt, and this should be reflected in the relevant guidelines.
- There should be clarity whether and to what extent bare trusts and nominee arrangements are to be included in the central register.
- Trustees should be required to adopt a risk-based approach when assessing whether the information they hold and they provide to the register is up-to-date and accurate.
- Access to the register by obliged entities should be ring-fenced to information on trusts with which the entities have a business relationship, in the interests of confidentiality.
- There should be clarity on whether and to what extent the Directive will apply to arrangements similar to trusts.

We believe that Ireland should exercise its Member State discretion under Article 30(9) to exempt public access to information on the beneficial ownership of corporate and legal entities, as outlined.

Yours sincerely



Cora O' Brien

Director