

The Beneficial Ownership Regulations 2016 are in force: what you need to know

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 came into operation on 15 November 2016.

Certain Irish Corporates must now:

- take “all reasonable steps” to obtain and hold “adequate, accurate and current” information in respect of their beneficial owners,
- construct and keep a new beneficial ownership register, and
- keep the information on beneficial ownership contained in the beneficial ownership register up to date.

Beneficial owners, for the purpose of the Regulations, are natural person(s) who ultimately own or control the entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights in that entity or through control by other means. A percentage of 25% plus one share is stated to be evidence of ownership or control through shareholding, and is stated to apply to every level of direct and indirect ownership.

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (the Regulations) were signed on 9 November 2016, but came into operation, and were only published on, 15 November 2016. The Regulations give effect to part of Article 30 of the Fourth Anti-Money Laundering Directive (4AMLD). 4AMLD is required to be transposed into Member State law by 26 June 2017. A key provision of 4AMLD is the identification and holding of information relating to beneficial ownership of companies and other legal entities. Article 30 of 4AMLD requires each Member State to ensure that corporate and other legal entities incorporated in that Member State hold adequate, accurate and current information on their beneficial ownership, and that information can be accessed in a timely manner by competent authorities and EU Financial Intelligence Units. Member States are also required to store this beneficial ownership information in a central register. All central registers established by Member States will be required to be interconnected in due course¹.

The Government has decided to transpose Article 30 in advance of the remainder of 4AMLD. The rationale for doing so appears to be that, in order for the central register of beneficial ownership

to be effective upon full transposition of the remainder of 4AMLD next year, companies and other legal entities incorporated in Ireland will need time to obtain the necessary information in respect of their beneficial owners, in order to be able to transmit the information to the central register.

Obligations imposed on “Relevant Entities”

The Regulations apply to every “relevant entity” as defined, generally, all corporate or other legal entities incorporated in the State, including companies and any other body corporate so incorporated, but excluding (a) companies or bodies corporate listed on an EU “regulated market” (such as the Main Securities Market of the Irish Stock Exchange), and who are subject to disclosure requirements consistent with the law of the EU, and (b) companies or bodies corporate which are subject to “equivalent international standards” which ensure “adequate transparency of ownership information”.

Under Regulation 4 (2), all relevant entities must take “all reasonable steps” to obtain and hold “adequate, accurate and current” information in respect of their beneficial owners, namely: (1) the name, date of birth, nationality and residential

¹The draft Directive known as 5AMLD, which is currently required to be transposed by 26 June 2017, amends 4AMLD and requires Member States to ensure that the central registers are interconnected via the European Central Platform.

address of each of its beneficial owners; and (2) a statement of the nature and extent of the interest held by each such beneficial owner. The relevant entity must then enter this information into its beneficial ownership register, together with the following information: (1) the date on which each natural person was entered into the register as a beneficial owner of the relevant entity; and (2) the date on which each natural person who has ceased to be a beneficial owner of it ceased to be a beneficial owner.

In the event that (1) there is no natural person identified (and the relevant entity has exhausted all possible means to identify the natural person and there are no grounds for suspicion) or (2) there is any doubt that any natural person so identified is a beneficial owner, the relevant entity shall enter the same details (name, date of birth, nationality etc.) of the senior managing officials of the relevant entity into the beneficial ownership register. Senior managing officials are defined to include a director and a chief executive officer.

This approach of including the details of senior managing officials in the beneficial ownership register may need to be followed in the case of “orphan” companies where the shares in such companies are held on trust for broad charitable purposes rather than for a specific entity or charity.

Who is a “Beneficial Owner” of a “Relevant Entity”?

The Regulations define a “beneficial owner” somewhat unhelpfully, by referring the reader to Article 3 (6) (a) of 4AMLD, which is not set out in or annexed to the Regulations. Article 3 (6) (a) of 4AMLD defines the term, in the case of corporate entities, as the natural person(s) who ultimately own or control the entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights in that entity or through control by other means as referred to in Article 3 (6) (a). A percentage of 25% plus one share held by a natural person is stated to be evidence of direct ownership, and a shareholding of over 25% held by a corporate entity under the control of a natural person(s), or by multiple corporate entities which are under the control of the same natural person(s), is stated to be an indication of indirect ownership.

Key Duties imposed on Relevant Entities

The relevant entity is required to do the following:

- Keep and maintain a new beneficial ownership register (BOR). It should be noted that in the event that an incorrect entry has been made to the BOR, an aggrieved person or other interested party may apply to the High Court for rectification of the BOR;
- Keep the information on beneficial ownership contained in the BOR up to date, by giving notice to the natural persons whose particulars are recorded in the BOR if the relevant entity learns of a change in beneficial ownership or other particulars in the BOR, or has reasonable cause to believe that the change has occurred.
- Give notice to any natural person, where the relevant entity has “reasonable cause to believe” that he or she is a beneficial owner, requiring the addressee to state if he or she is a beneficial owner of the relevant entity concerned, and to confirm or correct any details set out in the notice, and supply any that are missing, and giving the addressee one month to comply;

The Regulations provide for further, optional measures which may be taken by relevant entities in order to establish who are their beneficial owners. Regulation 7 provides that in order to establish the identity of beneficial owners, the relevant entity may serve a notice (in the form set out in Regulation 8) on any person if it has reasonable cause to believe that the person has or is likely to have knowledge regarding the identity of any natural person who is a beneficial owner of the relevant entity.

Key Duties imposed on Beneficial Owners

The beneficial owner of a relevant entity must comply with the following duties:

- In certain circumstances, set out in the Regulations, the beneficial owner must notify the relevant entity in writing of his or her status as beneficial owner, confirming the date on which they became a beneficial owner and certain personal details (date of birth, nationality, residential address etc.) as prescribed by the Regulations.

- In certain circumstances, also set out in the Regulations, a natural person who is a beneficial owner of a relevant entity is also obliged to notify that relevant entity of the occurrence of a relevant change regarding their status as beneficial owner.

Offences

Various offences are prescribed for failure to comply with the Regulations. For example, a relevant entity which fails (i) to take “all reasonable steps” to obtain and hold “adequate, accurate and current” information in respect of its beneficial owners, or (ii) to give the notice referred to above to a natural person believed to be a beneficial owner of it, or (iii) fails to keep its BOR up to date, will commit an offence, and be liable, on summary conviction, to a Class A fine (a fine not exceeding €5,000).

It is also an offence for a natural person to (i) fail to notify the relevant entity that he or she is a beneficial owner, where relevant; or (ii) to fail to comply with a notice served on it by a relevant entity. In any such case, the penalty on summary conviction is a class A fine.

Comment

The Regulations are very wide in scope. It will come as a surprise to many businesses affected by them that no exceptions are made, for example, for companies which have never traded; or which are now dormant; for charitable corporations; or even for companies which are in the course of being wound up or struck off the Register of Companies. This may be understandable, as the Regulations transpose (in part) Article 30 of 4AMLD, which itself does not contain any such exceptions from its scope. However, by not creating such exceptions, the Regulations will undoubtedly impose a further layer of red tape and compliance costs on those companies and could create logistical difficulties, particularly where large groups of companies are involved.

Perhaps more significantly, the Regulations have the potential to create practical problems for companies which will be anxious to comply with the new law, but which actually do not know

the identity of the individuals who are their ultimate beneficial owners. Such companies may, for example, be wholly-owned subsidiaries of other companies, which are themselves part of a larger group of companies including foreign corporations. While the directors of such subsidiaries will know the identity of the company which owns the shares in their company, and will likely know the identity of other companies above them in the group, they will not necessarily know who the individuals are who may be the ultimate beneficial owners of the company at the top of the chain. The effect of the Regulations, however, is to now impose on the directors of such subsidiaries an obligation to take “all reasonable steps”, including the serving of the notices referred to above, to try to find out who such ultimate beneficial owners actually are, and to construct, and keep such information in, its BOR. In some cases, this could be a difficult and time-consuming task for such directors, and legal advice may need to be taken to try to ascertain the exact extent of their obligations under the Regulations. Furthermore, the timelines involved for the service of notices from both the relevant entity and the beneficial owner, are demanding.

The Regulations will give rise to many challenges for investment funds and finance vehicles and their managers, particularly the obligation to keep information up to date in the context of daily dealing funds and intra-day dealing funds. Moreover, Irish investment funds are distributed globally and while the obligation for investment funds to maintain and transmit details of beneficial owners will be understood by European investors, it may prove problematic to obtain information from third country investors who may not be familiar with equivalent requirements. In a funds context, the obligation operates at umbrella, rather than sub-fund level.

Affected companies, which will include virtually all companies, public and private, limited and unlimited, which are incorporated in Ireland, as well as other bodies corporate incorporated here, will now need to ensure that they understand their new obligations, and that they have procedures and resources in place in order to be able to comply with them.

Our team



Mark Ward
Partner
+353 1 649 2208
mward@algoodbody.com



Alan Casey
Partner
+353 1 649 4495
acasey@algoodbody.com



Ciarán Rogers
Head of Department
+353 1 649 2204
crogers@algoodbody.com



Brian McDermott
Partner
+353 1 649 2307
bmcdermott@algoodbody.com



Julie Murray
Knowledge Lawyer
+353 1 649 2483
jmurray@algoodbody.com



Nollaig Greene
Knowledge Lawyer
+353 1 649 2359
ngreene@algoodbody.com



Jack O'Farrell
Consultant
+353 1 649 2230
jofarrell@algoodbody.com

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