Law Society of Ireland

STEP Ireland

Joint Submission

by

The Law Society of Ireland

and

STEP Ireland

On the matter of the proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the Fourth Anti Money Laundering Directive) ("4th AML Directive") Proposal 2013/0025

and

On the matter of the proposed amendments to the 4th AML Directive made by Draft Report on (COM(2013)0045) – C7-0032/2013 – 2013/0025(COD)) by the Committee on Economic and Monetary Affairs and Committee on Civil Liberties, Justice and Home Affairs

Dated 15 January 2014

Contents

Executive Summary

The purpose of this submission is to set out the joint views of the Law Society of Ireland and the Irish branch of the Society of Trust and Estate Practitioners (STEP Ireland) regarding the proposed 4th AML Directive primarily as it pertains to the area of private family trusts.

We are supportive of any measure which reduces the risk of money laundering in this area. We therefore broadly welcome the recommendations of the Financial Action Task Force (FATF) and the original wording of the draft 4th AML Directive which follows these recommendations. The original wording of the 4th AML Directive confirms and strengthens the measures which would prevent money laundering. However we strongly oppose the suggested proposal to amend the draft 4th AML Directive to include a requirement to create a register to record details of trusts.

Trusts are a common type of legal structure in Ireland. Family trusts (particularly trusts created under wills) are common in Ireland. The usual motivation behind the creation of a family trust is protection. This is often prompted by the needs of a family member who is vulnerable. Irish private trust arrangements will often relate to extremely sensitive and personal matters and are low risk for AML purposes. Trust structures are also used by charities and the pensions and the financial services industry which have their own reporting and regulatory regimes. There is therefore already a check on the placement of funds into trusts in the first place from a money laundering perspective.

A robust anti-money laundering regime currently exists under Irish law. The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, supplemented by the Criminal Justice Act 2013, transposed the 3rd Anti-Money Laundering Directive into Irish law. In addition to this, there are specific statutory provisions (particularly under tax legislation) where details regarding private trusts and charitable trusts must be disclosed to the Irish Revenue Commissioners. There are also separate regulatory regimes pertaining to the pensions and the financial services industry which impose significant reporting obligations on these entities and a new regulatory framework is to be introduced for Irish charities this year.

The current mandatory reporting of the details of many trust structures means that pertinent information is already available to competent authorities direct or on request. This framework mitigates against the risk of money laundering in a balanced and practical way.

The nature of many private trust structures means that a further requirement for a register would involve the potential public disclosure of extremely private and confidential information putting the vulnerable at particular risk. This has been recognised by the Irish High Court in its practice to restrict the availability of public information on death. It is our considered view that the proposed registration requirements in Article 29 would inadvertently and needlessly place similarly sensitive information in the public domain and exposing individuals, many of whom are of a vulnerable nature, to unnecessary risk.

Even if the significant risk of breach of privacy and confidentiality were to be overcome, a register is not necessarily an effective means of preventing money laundering. International research supports this view. FATF has not recommended a

register be adopted as it is not appropriate or indeed suitable (as the beneficiaries do not provide the seed capital to the trust).

The creation of a further register will create an unnecessary cost for trustees and EU/State agencies without any clear explanation of the possible benefits that might ensue.

A register would be a disproportionate measure in an area which is low risk for AML purposes.

Whilst we welcome the original wording of the 4th AML Directive, we suggest that the tax residence of the trustees is the more suitable criterion for imposing AML obligations, rather than tests such as those referring to "establishment within their territory" or "governed under their law" which are contained in the original wording. We would also suggest that the original wording could create unintended opportunities to circumvent the obligations under the Directive. The concept of tax residence would provide a more precise test for imposing the obligations under the Directive and would therefore suggest that this should be adopted.

Separate to our comments in relation to the draft 4th AML Directive, we believe that the area of family trusts is insufficiently regulated in Ireland and would welcome measures to enhance the regulation of trustees. We feel that regulation should introduce uniform standards of governance and practice. We feel that this would be very desirable given that many private trusts often operate for the benefit of vulnerable people. We submit that this would be of more benefit in this area than a register of trusts.

1. Background to Use of Trusts in Ireland

The use of trusts in Ireland is significant. Trusts are used for many different purposes and across a number of sectors which are of importance and relevance in Irish society.

The primary focus of this submission concerns family trusts in category (a) below which are the trusts with which the contributors to this submission have most experience.

The relevant sectors are:-

(a) Family trusts to hold the family wealth, which include as a sub-category trusts for vulnerable family members, to include trusts established by Wills, trusts by way of joint ownership of residential property (which may concern up to one half of all private residential dwellings in the jurisdiction) and trusts as alternatives to the affairs of vulnerable individuals becoming subject of the Wards of Court arrangements. Trusts are often used to implement property arrangements consequent on the dissolution of marriage and civil partnerships.

It is respectfully stated that such trusts are primarily used to provide for protection and preservation of capital from risks associated with vulnerable, young or immature beneficiaries in cases where additional taxation obligations are typically incurred but are accepted as a cost incidental to the preservation of capital value. In circumstances where a trust is established by a family member from their personal wealth, either in lifetime or by Will, with a relatively narrow class of family beneficiaries, it seems reasonable to state that such trusts can properly be regarded as low risk from a regulatory perspective.

Such trusts are required to be registered with the Revenue Commissioners and the trustees as a matter of trust law are required to prepare and maintain accounts for the trust. The form of trust may either be fixed interest, such that the trust instrument directs who is entitled to the income and capital of the trust from time to time, or, more commonly in trusts for the benefit of minor and vulnerable persons, the trust deed may confer discretion on the trustees, which authorises the trustees to apply income and capital in their discretion among the beneficiaries. As outlined at point 3 below the trustees are obliged to file annual returns of income and gains with the Revenue Commissioners and to comply with the broad framework of anti-money laundering obligations which are imposed by the Criminal Justice (Money Laundering and Prevention of Terrorism) Act 2010 as supplemental by the Criminal Justice Act 2013;

(b) Charities are often established by trust, which are required as a matter of Irish law to apply their assets exclusively for charitable purposes in accordance with Irish law. This sector is subject of extensive regulatory legislation in the form of the Charities Act 2009, in respect of which the Government has confirmed (July 2013) that the regulatory functions for such trusts would be commenced during the course of 2014;

(c) Pensions are often held through trusts by regulated trustees, for the benefit of the members of the relevant pension scheme;

(d) Unit Trusts often form the legal basis for collective investment arrangements which form a significant part of the financial services industry in Ireland. Such trusts are regulated by the Central Bank of Ireland in exercise of the jurisdiction of that body.

2. Effects of the 3rd AML Directive on Trusts

The 3rd AML Directive was transposed into Irish Law under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 ("the Act"). The Act imposes obligations on persons / entities classified as designated persons pursuant to section 25 of the Act. A "designated person" means any person, acting in the State in the course of business carried on by the person in the State, includes inter alia –

(a) An auditor, external accountant or tax advisor;
(b) A relevant independent legal professional;
(c) A trust or company service provider;
(d) A property service provider.

Prior to starting a business relationship, a designated person is obliged to comply with the obligations set out in Section 33 of the Act in respect of customers and the "beneficial owners" of its customers. The precise scope of the duty of a designated person will be subject to the outcome of a risk assessment.

In general terms, a risk assessment requires a designated person to consider the type of customer and business relationship involved as well as the purpose and intended nature of the business relationship and the source of funds.

In certain circumstances, special procedures will be required for business which relates to so called "politically exposed persons", special officials and certain members of state-owned enterprises.

The obligations for designated persons include an obligation to identify that customer and verify their identity. In verifying a customer's identity, a designated person may refer to documents from a government source or any prescribed class of documents.

Significantly the Act does not provide a definition of who is to be considered a customer in the context of a designated person dealing with a trust. The Irish Department of Justice guidelines on the prevention of use of the financial system for the purpose of money laundering and terrorist financing (February 2012) recommend for trusts where the risk is determined as standard that a designated person should identity all trustees and verify the identity of trustees or other persons, whether as protector or in their capacity as holder of a power of appointment over the trust fund, who are empowered to give instructions to the designated person to operate accounts.

Separately, quite apart from the obligations on designated persons for whom a trust may be a customer, a "trust or a company service provider" is in itself a designated person pursuant to section 25 of the Act.

Beneficial Owners and Trusts

Section 33(2)(a) of the Act refers to the obligation on all designated persons to identify "customers" and section 33(2)(b) imposes the further obligation to identify the beneficial owner connected with the customer or service concerned, by verifying the beneficial owner's identity to the extent necessary to ensure that the person has reasonable grounds to be satisfied that the person knows the beneficial owner and in relation to bodies corporate, partnerships, trusts or the estates of deceased persons,

to understand that ownership and control structure of the entity or arrangement concerned.

Quite apart from the obligation of designated persons to identify the customer themselves, there is a separate obligation under the Act to identify the beneficial owner connected with the customer or service concerned, to verify that beneficial owner's identity and to understand the ownership and control structure of the entity or arrangement concerned.

Section 28(2) of the Act defines a beneficial owner of a trust as any of the following:

(a) Any individual who is entitled to a vested interest in possession, remainder or reversion, whether or not the interest is defeasible, in at least 25% of the capital of the trust property.
(b) In the case of a trust other than one that is set up or operates entirely for benefit of individuals referred to in paragraph (a), the class of individuals in whose main interest the trust is set up or operates.
(c) Any individual who has control over the trust.

A designated person is required to identity beneficial owners of a trust but is only required to verify their identity, where reasonably warranted under the risk assessment. Where an individual is a beneficiary and is entitled to 25% or more in value of the trust, then they should be identified by the designated person.

Where a beneficiary is entitled to less than 25% of the trust, provided they do not have control over the trust as set out in the Act, then they will only need to be identified by reference to the class of individuals entitled under the trust. It is generally not necessary to verify their identity at this stage and only necessary to be able to identify the class such that they can identify the beneficiary at the date of payment from the trust to the beneficiary.

Where the trust in question is a "discretionary trust" it is not possible to ascertain in specific shareholding to each named individual potential object ("beneficiary" of the trust) as the entire trust would be considered the property of all named objects of the discretionary trust. The objects of the trust have no control over such a trust.

Finally, the Act in addition requires the formal keeping of records by designated persons and for competent authorities to effectively monitor the designated persons for whom it is a competent authority (e.g. the Central Bank for licensed banks) and take measures that are reasonably necessary for the purpose of securing compliance by those designated purposes with the requirements set out in the Act.

This approach ensures that information on trust beneficial ownership is available to competent authorities by designated persons who obtain and hold the necessary information and make this available to competent authorities if requested.

3. Existing registers for trusts in Ireland

Trusts which are used in different sectors of family business and public life in Ireland are subject to extensive reporting regulation.

In the case of trusts holding family assets, whether or not for vulnerable persons, such trusts are required to be registered with the Revenue Commissioners by completion of tax registration form TR1 which requires provision of detailed information concerning the trust. This registration is separate from the obligation under section 46(15) of the Capital Acquisitions Tax Consolidation Act 2003 ("**CATCA 2003**") to provide detailed information concerning a discretionary trust which includes provision of the terms of the trust, the name and address of trustees and objects, and an estimate of the market value of the property subject of the disposition. Furthermore these obligations are separate from the obligations upon any professional service provider by virtue of section 896A of the Taxes Consolidation Act 1997 ("**TCA 1997**") who

> "*has been concerned with the making of a settlement and knows or has reason to believe at the time of making of the settlement….the settlor was resident or ordinarily resident in the State and…the trustees were not resident in the State…to provide specific details of the settlement to the Revenue Commissioners*."

In relation to trusts established by Will, it is necessary in the course of an application for a grant of representation for particulars of the form of trust to be specified in the forms filed with the Irish Revenue. On death where the Will trust is a discretionary one, there is provision for alerting the Revenue Commissioners to the existence of such a discretionary trust at Part 6 Question 10 of the Revenue form CA 24 (Inland Revenue Affidavit) sworn by the Personal Representative-

"10. (a) Did the deceased create a discretionary trust:
(i) during his or her lifetime, or
(ii) under his or her will?
(b) Are any Principal Objects named as objects in a discretionary trust? (For the definition of Principal Objects please see the guide CA 25 on the Revenue website at www.revenue.ie).
If *Yes*, state date of birth of each"

All Inland Revenue Affidavits are submitted to the Revenue Commissioners in electronic format which makes the "mining" of such data very straightforward yet preserves the privacy of the details for the beneficiaries. Having a separate register to send this information again would be a duplication and privacy would be lost if the register was open to the public.

Where the Will Trust is a "Fixed Interest Trust" i.e. "to my wife for life and remainder to my children in equal shares" where the trust assets include land, these interests are registered with the Property Registration Authority in Ireland as a matter of good probate administration. In any event, the identity of the beneficiaries is provided to the Revenue Commissioners in a private manner.

Where the Will Trust is a bare trust e.g. for the protection of minors again, the identity of the beneficiaries is provided to the Revenue Commissioners in a private manner.

The High Court has made orders restricting who can obtain copies of the Grant of Representation and Inland Revenue Affidavit. Appropriate interest must be justified as the basis for seeking the relevant information. This provides a balance between preserving the rights of interested parties, yet protecting the information from scrutiny by the public. Such a balance is appropriate having regard to the risks to security of individuals, the risks of exploitation for vulnerable persons and the data protection implications which would arise if information including the name, address and PPS number of the deceased, and each of their taxable beneficiaries, was to be made available to the public.

In relation to charitable trusts, it is necessary for those trusts which seek to avail of tax exempt status to apply to the Revenue Commissioners for allocation of a CHY number. In our experience, virtually all charitable trusts apply for and obtain such a status. This involves a disclosure to the Revenue Commissioners of the identity of the trustees, the provision of the trust deed and provision of detailed information concerning the operation of the charity and adherence to the requirement of the Revenue Commissioners that accounts for the charitable trust be provided to the Revenue Commissioners from time to time.

As already referred to above, the Government decided in July 2013, following a consultation with stakeholders, to proceed with the commencement of the operations of the Charities Regulatory Authority during 2014, by the making of relevant Ministerial commencement orders pursuant to the provisions of the Charities Act 2009 which will ensure that the charitable sector will be subject to the extensive regulatory legislation in the Charities Act 2009.

It is beyond the scope of this submission to provide details of the regulatory framework which applies to pension trusts, but nevertheless it is clear that these forms of trusts are the subject of significant obligations in terms of reporting to the Irish Pensions Board, and the regulatory regime effected by the Central Bank in relation to UCITS, or Unit Trusts, whose offering is to the public.

It should be appreciated that reference to the substantive and ongoing engagement with the Revenue Commissioners and other appropriate State regulatory bodies are in addition to the obligations of the relevant trustees and their professional advisors to comply with all of the obligations to which they are subject by virtue of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 as supplemented by the Criminal Justice Act 2013.

4. The 4th AML Directive and Proposed Amendments – our response

STEP Ireland and The Law Society of Ireland welcome any measure which reduces the risk of money laundering in the context of trusts. We therefore broadly welcome the recommendations of the FATF and the 4th AML Directive as originally drafted.

In this regard, we welcome provisions which oblige trustees to keep and maintain accurate and current information on beneficial ownership regarding the trust. We agree that this information should include the identity of the settlor, of the trustee(s), of the protector (if relevant), of the beneficiaries or class of beneficiaries as defined, and of any other natural person exercising effective control over the trust.

We welcome provisions which ensure that trustees disclose their status to obliged entities with which they form a business relationship.

We welcome provisions which would ensure that relevant information can be accessed in a timely manner by competent authorities and obliged entities as appropriate, although we suggest in paragraph 6 below what we believe would be a more effective criteria to apply in relation to which competent authorities should receive such information.

To the extent that these measures are not included under current Irish law, we welcome any modification to achieve these. We feel that this would create a sufficiently robust and practical framework to minimise the risks of money laundering in the context of trusts.

However we do not support the suggested proposal to amend the draft wording of Article 29 of the proposed 4th AML Directive to include a requirement to create an additional register for trusts for AML purposes.

We feel that an additional trust register is unnecessary, that it would in any event be ineffective and that it would be a disproportionate response in terms of privacy, bureaucracy and cost.

In simple terms from an anti-money laundering perspective, we do not feel that such a register is necessary given the measures which already exist and those which would be adopted in accordance with the initial wording of the proposed 4th AML Directive and as recommended by FATF.

a. Beneficial ownership information already available

Is the our submission that adequate information in relation beneficial ownership for trusts has been, and will continue to be, accessible to competent authorities via the pre-existing registers and disclosure requirements outlined in paragraph 3 of this submission. We submit that an additional registration requirement for trusts is superfluous and amounts to duplication.

b. Effect of public register on privacy

The amended Article 29 of the 4th AML Directive proposes the creation of a register to hold information on the beneficial ownership of trusts. This would have the effect of requiring beneficiaries of testamentary trusts, court order discretionary trusts, family

trusts, resulting and constructive trusts to provide personal information that is then potentially available publically. This gives rise to immediate and obvious confidentiality and privacy issues given that such trusts typically involve vulnerable persons, in addition to concerns as to the appropriateness of such a measure and its disproportionality.

FATF in its 2006 paper on The Misuse of Corporate Vehicles, including Trust and Company Service Providers acknowledged that individuals and corporate vehicles have legitimate expectations of confidentiality. Such expectations are grounded in national constitutional frameworks and also supra-national conventions such as the European Convention on Human Rights. However, the Society of Trust and Estate Practitioners policy briefing of 2010 highlighted just how little attention this legitimate expectation has received in relation to the operation of trusts. Indeed, from an Irish perspective, it may be appropriate that the issue of privacy with regard to the proposed register be considered in the light of certain provisions of the Irish Constitution governing privacy.

Where the creation of a register has been previously considered in other jurisdictions, the experience, in particular that of South Africa, appears to have been that valid concerns were raised as to the incongruity between an up-front public registration requirement and the need to preserve privacy in sensitive personal financial matters.

In many cases, trusts are nothing more than agreements drawn up within families, making the concern for proper confidentiality all the more understandable. Trusts created in such a context for the protection and effective administration of assets for infant, vulnerable and/or incapacitated persons would, potentially, be captured by Article 29 and require personal and private information from those same vulnerable persons to be placed in a publically assessable forum inevitably defeating the very purpose of the protective nature of the trust for such persons. Similarly, trusts created pursuant to Court order relating to wards of court or relating to in camera proceedings, which are designed to preserve a modicum of privacy for those concerned in such sensitive cases, could see those protections frustrated by a requirement to disclose beneficial ownership information on a public register. It could be argued that such a register, in this context, could perhaps create security (including data security) risks for the beneficiaries.

As already mentioned at paragraph 3 above, precedent already exists in Ireland in relation to such confidentiality and security concerns. In 2012, a practice direction emanated from the High Court in Ireland which now serves to underscores the legitimate expectation for privacy and confidentiality regarding information relating to a person's estate. The direction stated that original wills and Inland Revenue Affidavits (the inventory of an estate's assets and liabilities for the purposes of taxation calculation) were not available publically, per se, but rather subject to accessibility limitations. Specifically, access is strictly limited to certain interested parties (being appropriate government agencies, beneficiaries and those who have a claim against the estate). It is submitted that this measure is illustrative of the real and valid confidentiality and security concerns regarding sensitive personal information of this nature and the pressing imperative that privacy, in this *limited* regard, be protected. It is our considered view that the registration requirements in Article 29 are inadvertently and needlessly placing similarly sensitive information in the public domain and exposing individuals, many of whom are of a vulnerable nature, to unnecessary risk.

On a separate note where trusts give rise to a class of beneficiaries even where, at a given time, such beneficiaries are un-enumerated or not entirely defined (such as a

trust benefiting a person's grandchildren), it is arguable that an up-front disclosure of such beneficiaries could precipitate conflict and indeed litigation that otherwise would not have occurred, once the beneficial interest becomes known.

In many cases, the will trust is contingent on other events occurring prior to the death of the Testator – for example in a simple will "to my wife if she survives me and on (usually discretionary) trust for my children if she does not survive me". Having a requirement to obtain details from contingent beneficiaries who may never in fact benefit could lead to difficult in appropriate enquiries and encourage unnecessary litigation by such contingent beneficiaries. There would be little point in registering such a contingent will trust as such beneficiaries may never in fact benefit under the trust.

c. Is a register effective to meet AML objectives?

We welcome the positive aims underpinning anti-money laundering measures and the fight against terrorist financing. We agree that information on beneficial ownership be available to competent investigative authorities. However, the means by which such necessary and desirable goals are achieved should be considered as an inappropriate method to achieve a noble aim has the potential to create unnecessary hardship. The amended Article 29 of the 4th AML Directive proposes the creation of a register to hold information on the beneficial ownership of trusts. This would have the potential effect of requiring beneficiaries of testamentary trusts, court ordered discretionary trusts, family trusts, resulting and constructive trusts to provide personal information that might then be available publically. It is the submitted that this register, in the context of trusts, will not provide additional effectiveness in achieving AML aims. It is submitted that the creation of the register is an inappropriate method, disproportionate in scope and contrary to measures adopted almost globally, unsuitable in the context of the structure of trusts and may not be applied consistently to be effective.

International experience

In 2010, The Society of Trust and Estate Practitioners ("STEP"), a worldwide professional association with over 18,000 members across 80 jurisdictions, produced a survey of the effectiveness of the various mechanisms used to ensure that beneficial ownership information on trusts is readily available to competent authorities. It concluded that the most widely used model for gathering information on trusts is via competent and well-regulated advisors who are required to pass that information on to the authorities. Further, it noted that "this approach is highly effective".

This international comparison highlighted that South Africa was unique in adopting a register approach (similar to the approach envisaged by the proposed amendment to the 4th AML Directive), requiring trusts to register with the authorities and provide key information as part of the registration process. It was further noted that there was no evidence, that when correctly applied, a regulated advisor approach or a register approach was more effective in achieving AML aims. It was further noted by the comparative analysis that the South African model raises inevitable and appropriate concerns as to how individuals' legitimate expectations of privacy and confidentiality might be vindicated.

The Law Commission of New Zealand considered in detail the question as to whether a register approach was required in that jurisdiction. It noted, inter alia, that

the administration and compliance costs associated with the creation and maintenance of such a register would be considerable and further noted the dearth of such registers in an international context. At present there is no requirement to register a trust in New Zealand.

Bearing this in mind, it is our considered view that, in light of the other concerns raised throughout this submission as to adverse implications, the requirement to impose a public register, whilst not advancing the stated motivation behind the Directive (being "to strengthen the internal market by reducing complexity across borders, to safeguard the interests of society from criminality and terrorist acts, to safeguard the economic prosperity of the European Union by ensuring an efficient business environment, to contribute to financial stability by protecting the soundness, proper functioning and integrity of the financial system), would suggest that the imposition of a public register is not necessary or desirable.

This comparative exercise concluded by saying (from the perspective of taxation information) that it appeared from empirical analysis that "the approaches developed at a national level to collecting AML information, combined with the strong investigatory powers most jurisdictions grant to tax authorities, appear to be generally 'fit for purpose' in terms of securing the information on trusts that jurisdictions need to fulfil their obligations under TIEAs". It was noted that new approaches to gather information for tax information exchange purposes would simply add cost for no obvious benefit. Analogously, it is therefore submitted that the implementation of an up-front disclosure mechanism such as that envisaged by the proposed Article 29 register achieves no AML purpose not already achieved by other means, and would do so at an indeterminate, but likely substantial, cost.

It should also be stated that it would appear from the recent FATF reviews that the presence of a registration regime is not necessarily a guarantee of compliance or a positive review by FATF. Similarly, the absence of a register is by no means indicative of non-compliance or a negative review. South Africa with its registration requirement was deemed only partially compliant in its review of 2009 whilst many jurisdictions without such registers were also deemed partially, largely or fully compliant, such as Canada, Cayman, the UK, Isle of Man, Jersey, Singapore, and indeed Ireland.

Appropriateness

Recital 4 of the Fourth Directive recognises the role of FATF as the foremost international body in the fight against money laundering and terrorist financing states and states that particular account should be taken of their recommendations and in particular European Union measure should be consistent with international fora and that Directives 2005/60/EC and 2006/70/EC should be aligned with the new FATF Recommendations adopted and expanded in February 2012. However, FATF 2012 Recommendations do not require the creation of such register as that proposed amendment to Article 29 of the 4th AML Directive. The proposed register is an inappropriate departure from those espoused recommendations and from measures in place in other international fora. It is proposed without any clear explanation of possible benefits that might accrue compared with its financial cost and confidentiality concerns and indeed may do harm to the privacy rights of beneficiaries who pose little AML risk.

Indeed it was stated by FATF in its 2006 paper on The Misuse of Corporate Vehicles, including Trust and Company service providers that –

> "it matters less who maintains the required information on corporate vehicles, namely:
>
> • the corporate vehicle itself;
> • the trust and company service provider;
> • the registrar of companies; or
> • another authority;
>
> provided that the information on beneficial ownership exists, that it is complete and up-to-date and that it is available to competent authorities. It is thus an essential corollary that competent authorities– especially across jurisdictional lines – need to know where relevant corporate vehicle information is held and how it can be obtained."

Clearly there is no objection to beneficial ownership information being available to competent authorities such as taxation and police functions (which is already the case as outlined at paragraph 3 above). However, it is clear from the above extract and from the FATF recommendations themselves that a **public** register of beneficial ownership interests in relation to trusts is by no means a stated or required AML goal of the FATF.

Suitability

The question as to whether an up-front disclosure requirement (such as the proposed register) is necessary at all should be given consideration. In 2002, the Steering Group on Corporate Governance of the OECD stated that such up-front disclosure systems were suitable in jurisdictions where there existed a high proportion of non-resident ownership and control of corporate entities, shell companies, asset holding companies, a weak investigative systems and where anonymity enhancing instruments were available. The above factors are largely irrelevant to many trusts utilised for family or testamentary matters or where a trust is created by order of a court. It is submitted that there exists little in the way of rationale of the order outlined above by the OECD for the creation of an up-front disclosure requirement such as is proposed in Article 29.

Indeed, it can be suggested that, unlike the beneficial owners of a company, the beneficiaries of a trust do not provide the capital normally and if they do in whole or in part then they are settlors. The object of the Directive is to prevent money laundering - the beneficiaries are not usually the source of any funds and (as FATF agrees with) once there is information about the settlor, trustees, protector and anyone else who exercises effective control then this will be enough information. It should be sufficient as this information (such as that which already exists in other Irish registers) will give the source and control of the funds.

Proportionality

The text of the 4th AMLD recognises that a risk-based approach is an effective way to identify and mitigate AML risks. The FATF in its 2008 paper on Guidance for Trust Companies and Service Providers stated somewhat axiomatically that proportionate procedures should be designed based on assessed risk. Higher risk areas should be subject to enhanced procedures. It also follows that in instances where risks are low, simplified or reduced controls may be applied. It further noted that there are no

universally accepted methodologies that prescribe the nature and extent of a risk-based approach. However, an effective risk-based approach does involve identifying and categorising money laundering and terrorist financing risks and establishing reasonable controls based on risks identified.

Lower risk activity such as trusts concerning family or estate matters particularly where there are vulnerable persons involved should, it is submitted, by virtue of its low risk status, benefit from an attenuated level of regulation. The identification requirements imposed by the proposed amendment to Article 29 represent, not a proportionally lower level of regulation, but rather a substantially increased regulatory burden that surpasses even that required by the FATF. It could also be suggested that such draconian measures, whilst effective in the context of the corporate sphere, may be redundant and ineffective at uncovering AML issues when applied to trusts in a family and testamentary context, given their respective low risk profiles.

It is submitted that the proposed register is a wholly inappropriate and disproportionate means of achieving AML aims that are already adequately and sufficiently achieved by alternative means.

Potential conflicts impairing effectiveness

The proposed amendment provides that Member States may grant access to the information to other parties and establish rules based on which the register can be accessed. One of the consequences of this registration requirement proceeding could be the creation of a diverse patchwork of national rules and criteria for the access of such national registers, potentially giving rise to unintended consequences and inequalities across Member States resulting in higher administration costs.

The 2002 paper from the Steering Group on Corporate Governance of the OECD highlighted that the proper oversight of the intermediaries who will be maintaining the beneficial ownership and control information is critical to the effectiveness of such system. It would appear that individual Member States will be responsible under the Directive for the creation, maintenance, drafting of rules and criteria for the accessing of such information. In such circumstances, significant privacy and confidentiality issues arise.

d. Cost Issues for a Register

The introduction of a register would create additional compliance costs for legitimate businesses, charities and individuals in the context of trusts.

Apart from the excessive and unnecessary compliance costs which would arise if a register is introduced, the suggested amendment to Article 29 paragraph 2, that "changes to information required shall be clearly indicated without delay and at the latest within 30 days" is unrealistic. For example in the context of a will trust (a very common type of private trust arrangement in Ireland), where the testator of a will trust dies and the will trust comes into effect on death, it may not always be possible to report on all beneficiaries or potential beneficiaries of that will trust within 30 days. In many cases, particularly in rural Ireland, traditionally the will is not read until after the "month's mind" i.e. the one month anniversary of the death of the testator. Also, where family members are not in close contact with each other, practical difficulties may arise in ascertaining the identity of beneficiaries of a trust within the 30 day

period, particularly when family members are residing outside the jurisdiction. This issue would also arise on the creation of other types of trust. It simply would not be feasible to obtain that information in all cases within this 30 day period.

It has long been recognised that probate is an area of low risk in relation to AML. It is respectfully submitted that Will Trusts are an area of similarly low risk. At present in accordance with the 3rd AML Directive, a firm administering an estate will carry out AML due diligence on the executor(s), trustees (if any) and all beneficiaries before transferring any assets, moveable or immoveable to such executors, trustees and/or beneficiaries. Where the assets include property, the ownership of same has to be registered with the Property Registration Authority and a copy of the Will Trust is lodged with both the Probate Office and the Revenue Commissioners. This is a further illustration of the fact that there are existing provisions under Irish law which ensure that relevant information is available to competent authorities, as appropriate.

It is noted that each Member State is to designate an authority to co-ordinate the national response. Currently, this is seen as a matter that falls within the remit of the Department of Justice and Law Reform. However, given the financial nature of the information required and the fact that so much of the information is already in the hands of the Revenue Commissioners, it may be seen as an issue for the Department of Finance to control. It is not clear which body will be involved and indeed it may appear that there is no existing body in Ireland to carry out this function. This would necessitate the creation of a new body with appurtenant costs to carry out this function at a time when the function is effectively being carried out by the Revenue Commissioners and other competent bodies who already have access to most if not all of this information and can where required maintain this information in a manner that protects the privacy of the beneficiaries. This would create further unnecessary cost at a time of obvious pressure on exchequer funds.

As noted above one of the reasons New Zealand did not adopt a register was because their research indicated that the administration and compliance costs associated with the creation and maintenance of such a register would be considerable. Also the survey by STEP mentioned above noted that new approaches to gather information for tax information exchange purposes would simply add cost for no obvious benefit.

5. Submission for Reform - Regulation of Trustees

Where trustees are solicitors, they are subject to the professional regulations applying to the solicitor's profession in Ireland. Where trustees are accountants, they are regulated by their profession in a similar fashion. Trusts which operate within sector specific areas are under the supervision of the competent authority for the industry in which they operate, such as pensions trusts being supervised at Revenue and Pensions Board level and unit trusts in the financial services sector being regulated by the Central Bank.

However for fiduciary service providers to private trusts, there is currently only one layer of regulation which concerns their compliance requirements as designated persons under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 and such further European legislation as may be introduced.

Apart from compliance with anti-money laundering legislation, bearing in mind their responsibility as designated persons, we see it as fundamental that such parties with primary duties pursuant to the anti-money laundering legislation are in turn fully vetted with uniform standards of good governance and practice being applied. This we feel would have a far greater and more productive impact than the proposed register.

We therefore believe that preferred approach would be to enhance the regulation of trustees in Ireland.

The disconnect between the regulation of private trusts and trusts operating in specific sectors as highlighted above is particularly concerning in the context of the requirement for transparency to protect those most vulnerable in society. This has already been noted and addressed with the introduction of a regulatory body for charities under the 2009 Charities Act. The rationale applied to charities equally applies to private trusts, most especially those that have been established to care for and safeguard the interests of persons with disabilities.

The Law Society of Ireland and STEP Ireland are awaiting the publication of the heads of the Trust Bill first proposed by the Law Reform Commission of Ireland in December 2008 and published by the Law Reform Commission as a draft Trustee Bill with their report on trust law published on 10th December 2008, see http://www.lawreform.ie/2008/report-on-trust-law-general-proposals.188.html It is noted that in the Legislation Programme For Autumn Session 2013 published on the 18th September last that the Trusts Bill is listed at number 116 in Section C; Bills in respect of which heads have yet to be approved by Government. It is not possible to indicate at this stage when publication of the heads of the Bill can be expected.

We would indeed hope that the Trusts Bill goes further than the LRC proposals in regulating the activities of trustees to private trusts and providing for a register of professional trustees.

It is respectfully submitted that regulation of private trustees would serve the outcome desired to protect beneficiaries, to maintain transparency and to ensure regulation for AML purposes far better than a register of beneficial ownership of trusts.

6. Suggested amendment to 4th AML Directive regarding trust residence

The original text proposed in Article 29.1 indicated that Member States should ensure that trusts "established whithin their territory" obtain and hold adequate, accurate and current information on their beneficial ownership and Article 30.1 in framing the information to be sought described the requirement for the Member States of any express trust "governed under their law" to obtain and hold this information.

Whilst the revised draft has deleted Article 30.1 in favour of a more expansive revised Article 29, the revised Article 29 imposes an obligation for Member States to ensure relevant entities "governed under their law" hold and transmit to a register adequate, accurate and current information on their beneficial ownership, at the moment of establishment and any changes thereof."

Irish tax law effectively taxes trustees on the basis of the residence of trustees. The concern is that a Member State would be effectively obliged to require a trust on their register if the proper law (governing law) of that trust was that of the Member State even if the trust was not resident in that Member State, held no assets in that Member State and there was no other connectivity to the Member State in question.

We respectfully submit the residence of the trustees as the more suitable criterion for imposing this obligation, rather than language such as "establishment within their territory" or "governed under their law" which may in some cases duplicate obligations for Member States and trust entities in such Member States which would be costly and time consuming.