Briefing Note

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (the Regulations)

Introduction[1]

S.I. No. 560 of 2016 - European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 came into operation on 15 November 2016. The purpose of this note is to summarise the industry's views on the application of the Regulations to the most common types of charitable trust arrangements used to hold shares in Irish registered SPVs.

Background

Under the Regulations certain Irish companies must now:

- take "*all reasonable steps*" to obtain and hold "*adequate, accurate and current*" information in respect of the natural persons who are their ultimate beneficial owners (**UBOs**); and

- maintain an up to date beneficial ownership register (**BOR**).

The Regulations will apply to most Irish incorporated SPVs and it is necessary to determine the identity of the relevant UBOs in each case. This requirement raises a number of questions in the context of Irish SPVs where the SPV shares are held by a share trustee under a charitable trust.

The Regulations are stated not to apply to a company that is listed on a regulated market that is subject to disclosure requirements consistent with EU law or subject to equivalent international standards on transparency of ownership. It appears that this exemption would only apply to companies with equity listings and as such would not assist Irish SPVs with debt listings alone.

Who is the UBO?

Under the Regulations the UBOs are the natural persons who ultimately own or control the SPV and include natural persons who:

1. own or control the SPV through direct or indirect ownership of a sufficient percentage of the shares or voting rights in the SPV (the **Shareholding Test**). A percentage of 25% plus one share is stated to

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be evidence of ownership or control through shareholding and is stated to apply to every level of direct and indirect ownership. Shares held on trust are excluded for the purposes of this test; or

2. control the SPV "*through other means*". A UBO may control an Irish company by other means in accordance with the criteria set out in Directive 2013/34/EU, including control obtained through a shareholders' agreement, the exercise of dominant influence or the power to appoint "senior management" to the company (the **Control by Other Means Test**).

Regulation 4(4) provides that " *if, after having exhausted all possible means"* and where there are no grounds for suspicion, no natural person can be identified as the UBO or there is any doubt as to the identity of the UBO, the natural persons who hold the position of senior managing officials (**SMOs**) are deemed to be the UBOs for the purpose of the Regulations.

The SPV would have to attempt to identity its UBOs based on the Shareholding Test and the Control by Other Means Test in each case. If no UBOs can be identified under either test, then the SPV can proceed to record its SMOs as the UBOs. The SPV must also keep records of the actions taken in attempting to identify the UBOs.

Charitable Trust Structures

The most common types of charitable trust arrangements used to hold shares in Irish SPVs are arrangements where the shares are held in the name of a trustee entity on trust for the benefit of either:

1. any entity having charitable status under Irish law, as selected by the trustee in its discretion (a **Discretionary Charitable Trust**); or

2. a specific named charitable organisation (a **Specific Charitable Trust**).

We note that the Regulations require Irish SPVs to take "*all reasonable steps*" to identify the natural persons who are their UBOs. Under Regulation 5 Irish SPVs are specifically required to send a notice to "*any natural person whom it has reasonable cause to believe to be a beneficial owner of it*".

In the case of a Discretionary Charitable Trust, it would normally not be possible to identify any specific charity as the beneficial owner of the SPV shares until the trustee's discretion to name one or more beneficiary charities is exercised. This in turn means that for so long as the trust remains discretionary, it would be effectively impossible for the Irish SPV to identify any natural person that it has reasonable cause to believe to be its UBO based on the Shareholding Test.

In the case of a Specific Charitable Trust, it appears that it would be unlikely that the SPV could identify any natural person that it has reasonable cause to believe to be its UBO based on the Shareholding Test.

The SPV would also need to establish whether any natural person is its UBO based on the Control by Other Means Test. In most cases it would be unlikely that the Control by Other Means Test would produce a natural person UBO but this should be considered and documented by the SPV. This would require an analysis of the terms of relevant trust deed and transaction documents.

If the SPV does not have reasonable cause to believe that any natural person is its UBO, then there would be no basis for the SPV to issue a notice under Regulation 5.

Under Regulation 7 SPVs may issue a notice to "*any person (whether a natural person or not)… if it has reasonable cause to believe that the person has the knowledge"* of the identity of the UBO. Given the requirement for Irish companies to "*take all reasonable steps*" to identify its UBOs and the need to "*exhaust all possible means*" under Regulation 4, SPVs should consider whether it would be appropriate to issue a notice under Regulation 7 in each case. For instance, such a notice could be issued to the trustee seeking information on UBOs where in the circumstances there may be natural person UBOs based on the Control by Other Means Test. The SPV could also consider issuing a Regulation 7 notice to the named charity in the case of a Specific Charitable Trust (this would not be relevant for Discretionary Charitable Trusts).

If the SPV cannot identify any natural person UBO and the responses to any Regulation 7 notices issued do not identify any such person, it would then be appropriate for the SPV to enter the names of its SMOs in its BOR. The SMOs in this instance would be the SPV directors, there being no CEO. The BOR would state that the SPV directors are entered in the BOR as SMOs because no natural person can be identified as UBO. The BOR should then be monitored and updated to reflect any changes in the SMOs or UBOs.

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