
NEBOT Paper 3

Beneficial Ownership Registration for Trusts – Gaps and Loopholes

Network of Experts on Beneficial Ownership Transparency, NEBOT



Beneficial Ownership Registration for Trusts – Gaps and Loopholes

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Abstract

Trusts are a type of legal vehicle which can be used to run a business, own shares or hold assets such as a house or a bank account. Although many trusts are used for legitimate businesses or for family purposes, including for the protection of children and vulnerable individuals, trust provisions can be subject to abuse. The secrecy provisions of trusts can be so sophisticated that competent authorities do not even attempt to go after them.

This paper analyses the beneficial ownership legal framework on trusts established by the Financial Action Task Force and by the EU Anti-Money Laundering Directive (AMLD), comparing it to the provisions applicable to legal persons. In addition, the paper describes the different

ways in which EU Member States have transposed the AMLD in relation to the scope of trusts subject to beneficial ownership registration, the conditions which trigger registration, the parties that have to be identified, and the exceptions as well as the access to information. The paper analyses the gaps and loopholes available in the legal framework in relation to scope, beneficial ownership definitions, special types of trusts and complex ownership structures that should be subject to further regulation, and enforcement capabilities. Finally, the paper proposes general policy recommendations as well as suggested amendments to the draft text of the “AML Package” regarding the reform of the beneficial ownership transparency framework in the EU.

1. Introduction

In the classic case, trusts are a type of legal vehicle where a party called a “settlor” or “grantor” transfers assets, e.g. money or real estate, to another party called the “trustee” for the purpose of holding the assets under its name (as the legal owner) and managing them in favour of “beneficiaries” according to instructions and designation of beneficiaries (or classes of beneficiaries) established by the settlor in the trust deed.

Trusts are a type of legal vehicle which can be used to run a business or hold assets such as a house or a bank account. Trusts are widely used in common law countries, although they have also become popular in civil law countries that either possessed similar provisions based on Roman law or had established new laws to incorporate the features of the Anglo-Saxon trust. Although many trusts are used for legitimate businesses or for family purposes, including for the protection of children and vulnerable individuals, trust provisions can be subject to [abuse](#). Provisions related to [secrecy and asset protection](#) have resulted in trusts being involved in accusations of [tax evasion](#), [avoidance of sanctions](#), [money laundering](#), [embezzlement](#), [defrauding creditors](#), [defrauding the spouse upon divorce](#), or even used to shield assets against victims of [murder](#) or [sexual abuse against a minor](#).

The secrecy provisions of trusts can be so sophisticated that competent authorities do not even attempt to go after them. For instance, the famous 2011 StAR (World Bank/UNODC) report on grand corruption cases, “[The Puppet Masters](#)”, acknowledged:

*Investigators interviewed as part of this study argued that the grand corruption investigations in our database failed to capture the true extent to which trusts are used. **Trusts, they said, prove such a hurdle to investigation, prosecution (or civil judgment), and asset recovery that they are seldom prioritized in corruption investigations. Investigators and prosecutors tend not to bring charges against trusts, because of the difficulty in proving their role in the crime...** As a result, even if trusts holding illicit assets may well have been used in a given case, they may not actually be mentioned in formal charges and court documents, and consequently their misuse goes underreported.* (pp. 45-46, emphasis added).

The paper on “[Concealment of beneficial ownership](#)” by the Financial Action Task Force (FATF) and the Egmont Group reached similar conclusions:

The interaction of the trust with other legal persons adds an additional layer

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*of complexity and helps frustrate efforts to discover beneficial ownership... **It is also possible that the use of legal arrangements may increase the difficulty of investigating and identifying the beneficial owner, thereby explaining their relatively low prevalence in the case study sample.***

(p. 34, emphasis added)

Classification

Although the classification and treatment of trusts vary depending on the country, by global standards, trusts are usually considered legal arrangements (rather than legal persons or entities), hence why they are regulated separately. The FATF regulates beneficial ownership transparency for legal persons under Recommendation 24, while provisions for legal arrangements such as trusts are included under Recommendation 25. The EU AMLD also regulates beneficial ownership registration for legal persons in Art. 30, while trusts and other legal arrangements are regulated by Art. 31.

Although the 4th AMLD already required some trusts to register their beneficial owners, the ambiguous wording led to uncertainty as to which trusts were subject to registration (based either on the trust's governing law or on the trustee's location).

The 4th AMLD also limited registration of trusts to those that generate tax consequences, although the term "tax consequences" was not defined:

*Art. 31.1 Member States shall require that **trustees of any express trust governed under their law** obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust...*

*4. Member States shall require that the information referred to in paragraph 1 is held in a central register **when the trust generates tax consequences.***

As the next table shows, the 5th AMLD clarified that trusts subject to beneficial ownership registration include those whose trustee is located in the EU, as well as any trust that has acquired real estate or established business relations in an EU country. Access to trusts' beneficial ownership registration would be based on demonstrating a legitimate interest. These provisions are quite different from those that apply to legal persons, where the trigger for registration is based on incorporation and where access to information is public.

Table 1: Different provisions for legal persons and trusts in the AMLD

Legal persons	Trusts
<p><u>Scope</u> Art. 30.1) Member States shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held...</p>	<p><u>Scope</u> Art. 31. 3a) Member States shall require that the beneficial ownership information of express trusts and similar legal arrangements as referred to in paragraph 1 shall be held in a central beneficial ownership register set up by the Member State where the trustee of the trust or person holding an equivalent position in a similar legal arrangement is established or resides.</p>
<p>3) Member States shall ensure that the information referred to in paragraph 1 is held in a central register in each Member State, for example a commercial register, companies register as referred to in Article 3 of Directive 2009/101/EC of the European Parliament and of the Council(1), or a public register...</p>	<p>Where the place of establishment or residence of the trustee of the trust or person holding an equivalent position in similar legal arrangement is outside the Union, the information referred to in paragraph 1 shall be held in a central register set up by the Member State where the trustee of the trust or person holding an equivalent position in a similar legal arrangement enters into a business relationship or acquires real estate in the name of the trust or similar legal arrangement...</p>
<p><u>Access</u> Art. 30.5) Member States shall ensure that the information on the beneficial ownership is accessible in all cases to: (...) c) any member of the general public.</p>	<p><u>Access</u> Art. 31.4) Member States shall ensure that the information on the beneficial ownership of a trust or a similar legal arrangement is accessible in all cases to: (...) (c) any natural or legal person that can demonstrate a legitimate interest;</p>

Gaps and Loopholes

Given that trusts cannot be created according to local laws in many countries, many of these jurisdictions fail to have provisions or to properly regulate trusts, even though (foreign) trusts could be holding assets or companies in the country. In other cases, even common law countries with centuries-old traditions of trusts may face some challenges to ensure trusts' beneficial ownership transparency.

The first issue is one of enforcement. In many countries, trusts do not need to incorporate or be registered in order to exist, to have legal validity or to enjoy benefits (they may need to register if they hold real estate, but that is because real estate ownership requires registration). Since trusts are not incorporated in the relatively standardised way that companies are (if the trusts are registered at all), there is no information on the number of trusts that exist in the world, the value of their assets or the individuals associated with them. In contrast, most legal persons need to register either to exist (have legal validity) or at least to enjoy limited liability. As a result, although the AMLD's Art. 31 requires trusts to register their beneficial owners in certain situations, e.g. if the trustee is located in the EU, without information on whether a trust even exists, compliance with beneficial ownership registration may be considered voluntary or simply impossible to enforce (unless indirect measures are established, as proposed below).

Second, trusts tend to have much more complex control structures than companies. The problem is that a country may only have a general definition of beneficial ownership which does not apply to trusts (e.g. if it is based on thresholds or refers to "ownership"),, with the result that the definition may fail to include all the relevant parties. As established by the FATF and the AMLD, all parties of a trust (settlers, protectors, trustees, beneficiaries/classes of beneficiaries and any other individual with control over the trust) should be identified as beneficial owners of a trust:

AMLD, Art. 31.1, second paragraph:

Each Member State shall require that trustees of any express trust administered in that Member State obtain and hold adequate, accurate and up-to-date information on beneficial ownership regarding the trust. That information shall include the identity of: (a) the settlor(s); (b) the trustee(s); (c) the protector(s)(if any); (d) the beneficiaries or class of beneficiaries; (e) any other natural person exercising effective control of the trust.

Third, there is usually insufficient regulation for situations where the party to a trust is a legal person rather than an individual. This creates two problems. On the one hand, the definition may be unclear as to who should be identified as the beneficial owner (whether the corporate trust party must be looked through or whether it is possible to register the legal person as a trust party).

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On the other hand, even if look-through provisions are applied, the mere combination of legal persons as parties to the trust would add (impose) thresholds on a definition which is supposed not to have thresholds (see the discussion below on thresholds for further details).

Fourth, based on FATF Recommendations, trust transparency usually relies on the trustee, who is considered an obliged entity. This creates two issues. For one, regulations may only cover the use of professional trustees while neglecting non-professionals who act as trustees (e.g. someone who acts as trustee only for her brother's trust). Additionally, the focus on trustees means that there may be no beneficial ownership transparency regarding trusts created within the legal framework of an EU country if that trust does not have an EU trustee (or real estate/bank accounts in the EU). In contrast, all local EU legal persons must register their beneficial ownership upon incorporation.

Fifth, access to trusts' information is restricted, although there are provisions where access is granted based on a legitimate interest or in cases in which a trust owns a non-EU company. However, the loopholes mentioned in the point above mean that the EU may have no information on that trust in the first place.

The rest of this paper is organised as follows. Section 2 offers an overview of how EU countries have regulated beneficial ownership for trusts, including issues on triggers, definitions, and public access to information. Section 3 describes gaps, loopholes as well as best practices in relation to trust beneficial ownership registration, particularly on triggers and exceptions, identification of trust parties, complex structures, access to information and measures for enforcement. Section 4 proposes policy recommendations, including comments to the proposed "AML Package".

2. The situation in EU countries

Based on the findings of the Tax Justice Network's [Financial Secrecy Index](#) published in 2022, the following table shows for each EU Member State: whether domestic trusts (or similar structures such as *fiducie*, *Treuhand* or *fideicomiso*) can be created according to local laws, the scope of trusts (foreign and/or domestic) which are subject to beneficial ownership registration, exceptions to the scope, conditions that trigger beneficial ownership registration, the list of trust parties that have to be identified as part of beneficial ownership registration, and whether there is public access to beneficial ownership information of trusts (at least *de jure*, i.e. based on the legal framework).

As for the conditions that trigger registration, the table entry "AMLDD" refers to a legal framework that follows the criteria mentioned in the Directive, which requires registration whenever a trust is administered by a local trustee or when the

trust acquires real estate or establishes business relations in the EU. The symbol (+) indicates that the country, in addition to adopting the Directive triggers, requires trust registration in additional cases, e.g. for trusts created according to local laws. The symbol (-) indicates that the country has adopted fewer conditions compared to the Directive or that it added additional limitations not contained in the Directive, e.g. that trusts are covered only if the trustee is a natural person or if the trustee is a professional.

With regard to the trust parties that have to be identified as part of beneficial ownership registration, the table entry "AMLDD" refers to a legal framework that follows the criteria mentioned in the Directive, which requires registration of the settlor, trustees, protectors, beneficiaries and any other individual with effective control over the trust.

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Table 2: Legal framework regarding trusts in each EU Member State

Country	Domestic trusts?	Scope of trusts	Exceptions	Trigger	Trust parties to be identified	Public access?
Austria	Yes	Both	-	AML	AML	Yes
Belgium	-	Foreign	-	AML	AML	-
Bulgaria	-	Foreign	-	Local trustee	AML	Yes
Croatia	-	Foreign	-	AML	AML	Yes, for locals
Cyprus	Yes	Both	-	AML(+)	AML	-
Czechia	Yes	Both	-	AML(+)	AML	Yes, on some parties
	-	Foreign	-	AML	Beneficiaries + (other parties if "BO" is such in other ways)	Yes
Denmark						
Estonia	-	Foreign	-	Local trustee	AML	(It will be)
Finland	-	Foreign	-	AML	AML	-
France	Yes	Both	-	AML(+)	AML	-
	Yes	Foreign & some domestic	-	AML	AML	Yes, for a fee
Germany						
Greece	-	Foreign	-	AML(+)	AML	-
	Yes	Both	-	AML if local bank	AML	-
Hungary						
Ireland	Yes	Both	Yes	AML	AML	-
Italy	Yes*	Both	-	Other*	AML	-
Latvia	-	-	-	-	-	-
Lithuania	Unclear	Foreign	-	AML(-)	AML	-
Luxembourg	Yes	Both	-	AML	AML	-
Malta	Yes	Both	-	AML(-)	AML	-
Netherland	Similar*	Both	-	AML	AML	Yes
Poland	-	Foreign	-	AML	AML	Yes
	-	Foreign	-	AML, w/out real estate	AML	Yes, for locals
Portugal						
Romania	Yes	Both	-	AML (-+)	AML	-
Slovakia	-	-	-	-	-	-
	-	Foreign	-	AML	AML (only if natural person?)	Yes
Slovenia						
Spain	-	Foreign	-	AML	AML	-
Sweden	-	Foreign	-	Other	AML	Yes, for locals

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Table References

Existence of domestic trusts. **Italy** notified the EU Commission of the existence of the *mandato fiduciario* and the *vincolo de destinazione* as being similar to trusts. In **Lithuania**, although most of the assessments suggests that domestic trusts cannot be created, a paper by the EU Commission identified trust provisions in Art. 4106 of the Civil Code. In **Luxembourg** it is possible to create a *fiducie*. **The Netherlands** notified the EU Commission of *fonds* as being similar to trusts.

Scope of trusts. In **Germany**, the scope covers the “*nicht rechtsfähige Stiftung*” when the trustee is in Germany and the trust is self-serving for the settlor/for profit. It appears that the *Treuhand* is not covered. In **Latvia** and **Slovakia**, beneficial ownership registration does not apply to trusts.

Triggers. In **Cyprus**, the scope also covers domestic trusts. In **Czechia**, it also covers domestic trusts and trusts with main assets or its main purpose in Czechia. In **France**, it also covers domestic trusts, trusts with assets, rights or where any settlor or beneficiary is in France. In **Greece**, it also covers trusts where the settlor or beneficiary are tax residents in Greece. In **Hungary**, it appears that only local banks may file beneficial ownership information, so a trust would need to engage with a local bank to be able to register beneficial ownership data. In **Italy** the trigger is trusts that have effects for tax purposes, or trusts that are established or resident in Italy. However, as of March 2022, the legal framework for beneficial ownership registration was not yet in force. In **Lithuania**, it appears that other than having real estate or business relations, the trigger is having a sole professional trustee (it is not clear what happens for a non-professional trustee or when a trust has more than one trustee). In **Malta**, apart from trusts which acquire real estate or establish

business relations, only trusts administered by professional trustees are covered (but not those managed by private trustees). In **Portugal**, trusts have to register their beneficial owners if they have a Tax Identification Number; if they engage with activities with obliged entities; if the trustee is themselves an obliged entity; the trustee is located in Portugal; or if the trust is authorised to operate in the Madeira Free Trade Zone. In **Romania**, it covers domestic trusts and trusts which acquire real estate or establish business relations, but not necessarily trusts with a local trustee. In **Sweden**, it appears to apply to trustees who are natural persons who reside in Sweden, or who reside abroad but with operations in Sweden.

Exceptions. In **Ireland**, the following trusts are excluded from the definition of “relevant trust”: (a) an occupational pension scheme that is an approved scheme pursuant to Chapter 1 of Part 30 of the Act of 1997; (b) an approved retirement fund within the meaning of Chapter 2 of Part 30 of the Act of 1997; (c) a profit sharing scheme or employee share ownership trust approved pursuant to Part 17 of the Act of 1997; (d) a trust for restricted shares within the meaning of section 128D of the Act of 1997; (e) the Haemophilia HIV Trust which was established by deed dated the 22nd day of November 1989, made between the Minister for Health, of the one part and certain other persons, of the other part; (f) a unit trust within the meaning of the European Union (Modifications of Statutory Instrument No. 110 of 2019).

Public access. In **Croatia**, a national ID is necessary to access the register. In **Czechia**, there is no public access (unless a legitimate interest is proven) to information on settlors, beneficiaries or protectors. In **Estonia**, authorities state that the information will be publicly available for a small fee.

3. Mind the gaps

As Table 2 indicates, there are several gaps in the legal framework of EU countries' beneficial ownership registration of trusts that would affect compliance with the Directive and that would undermine transparency to tackle money laundering. This section explores loopholes in relation to the scope of trusts subject to registration, the beneficial ownership definition, scenarios with complex ownership structures, access, and challenges to enforcement.

3.1 Triggers and exceptions

As the table shows, less than half of EU Member States allow for the creation of trusts under their laws: Austria, Cyprus, Czechia, France, Germany, Hungary, Ireland, Luxembourg, Malta and Romania. Italy and the Netherlands declared to the EU Commission some structures as being similar to trusts. Lithuania did not indicate that it had domestic trusts, but a paper from the EU Commission suggested otherwise.

Most countries that allow domestic trusts to be created under their laws cover both domestic and foreign trusts, except for Germany where it is not clear if some types of domestic law trusts are covered (the *Treuhand* and some "*nicht rechtsfähige Stiftungen*"). In Latvia and Slovakia, there is no beneficial ownership registration for trusts. In addition, Ireland is the only

country to add explicit exceptions to the scope of trusts that are registered. These exceptions refer to trusts used for pension schemes or other trusts approved by the tax administration.

As for the conditions that trigger beneficial ownership registration, there is inconsistency between countries. Although most countries follow the AMLD conditions (i.e. a local trustee or acquiring real estate or establishing business relations), some countries go beyond these conditions. For instance, Cyprus, Czechia, France and Greece also cover domestic trusts, some trusts with local assets or where some parties to the trust are residents.

On the other hand, some countries fall short on complying with the AMLD conditions. For example, Bulgaria and Estonia only require registration when there is a local trustee in the country (not when the trust acquires real estate or establishes relations). Romania is the opposite, where the conditions on real estate and business relations are present, but having a local trustee does not trigger registration. Portugal fails to include the condition on acquiring real estate, although it adds other situations (e.g. trusts with tax identification number or trusts authorised to operate in the Madeira Free Zone). In Hungary, it is not clear if beneficial ownership registration is dependent on the trust having a local bank

account, since only bank managers appear to be allowed to file beneficial ownership information. In Italy, trust registration is based on having tax consequences or the trust being established or resident in Italy, but registration was not yet in force as of March 2022. Malta and Sweden make registration dependent on the trustee being a professional or a natural person, respectively.

3.2 Identification of all parties

The AMLD requires all parties to the trust to be registered, including the settlor, trustee(s), protector, beneficiaries or classes of beneficiaries as well as any other individual with effective control over the trust. However, not all EU countries require this. For instance, while Denmark's law mentions all trust parties, the Executive Order on amendment of the Executive Order on registration with the Danish Business Authority exempts the settlor, the trustee and the protector unless they are considered beneficial owners for additional reasons, not just for being for instance a "settlor". In Slovenia, it is unclear if the law applies only to natural persons who are the settlor, trustee, or protector, etc.

¹ For instance: "In principle, the legal settlor is the founder. If a professional third party has set up a trust, the individual tax resident of Belgium who has contributed assets into that trust (ie the economic settlor) is deemed to be the targeted founder" (Lust, S., "The Belgian 'Cayman tax' and its impact on wealth and estate planning in Belgium", *Trusts & Trustees* 2017); "I am aware of a trust that was

3.2.1 Economic and legal settlor

A beneficial owner must always be the "real" individual with control, ownership or benefit, rather than a nominee, agent or proxy. However, as some articles suggest, some complex trust structures involve two types of settlors: the legal settlor (a nominee) who will appear on the trust deed and thus would be registered, as opposed to the "economic" settlor (the real owner of the assets settled into the trust) who deliberately tries to remain hidden.¹ For this reason, the Directive could make it explicit that the settlor must always refer to the real (former) owner of the assets who put them into the trust. Alternatively, the law could require the identification of both the "legal settlor" (similar to a nominee shareholder who offers their name to appear in the trust deed) as well as the "economic settlor" who actually puts the assets into the trust.

3.2.1 Discretionary beneficiaries

There are many types of trusts. Trusts focusing on asset protection usually involve a discretionary component, where the trustee is given discretion (on paper) to decide on trust distributions. This means that the trustee may be able to choose when a distribution will be made and how

settled, I believe, in 2012, and I'm aware that the settlor was, what I would call in this discussion, a legal settlor rather than an economic settlor, and I'm aware that the legal settlor was a professional adviser" ("*Taxation and Regulatory Issues Involving International Trusts: The Full Transcript*" Taxlinked.net),

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much will be given, but more importantly, if a distribution will be made at all.

Asset protection trusts rely on the trustee's discretion, rather than establishing distribution instructions beforehand e.g. "distribute 50% each year to each of the two beneficiaries" in order to respond more flexibly to changing circumstances. For instance, if one of the beneficiaries has had a good year, receiving a trust distribution may trigger higher marginal personal income tax rates. To avoid paying such tax, the beneficiary may choose to postpone distributions until a year with reported losses which could be offset, so as not to pay additional personal income tax. An even greater extreme is a situation where an insolvent beneficiary owes money to creditors. In such case, if any distribution is made, the money will end up in the creditors' hands. To prevent this, discretionary trusts usually include provisions to prevent distributions to indebted beneficiaries.

Discretionary trusts also create secrecy. Being the beneficiary of a discretionary trust, a beneficiary could claim not to be a beneficial owner because they are merely "potential" beneficiaries and may end up not receiving anything at all. Even the OECD's Common Reporting Standard (CRS) [Implementation Handbook](#) allows for this non-preventive identification of beneficiaries of a discretionary trust: "*With respect to trusts that are Passive NFEs, a jurisdiction may allow Reporting Financial Institutions to align the scope of the*

beneficiary(ies) of a trust treated as Controlling Person(s) of the trust with the scope of the beneficiary(ies) of a trust treated as Reportable Persons of a trust that is a Financial Institution. In such case the Reporting Financial Institutions would only need to report discretionary beneficiaries in the year they receive a distribution from the trust" (p. 19). In other words, criminals or other individuals may be appointed as "discretionary beneficiaries" and thus avoid being automatically identified as beneficial owners of the trust, as happens with any other party to the trust.

The Directive should contain explicit provisions on discretionary beneficiaries. At the very least, it should require beneficiaries to be identified whenever they receive a distribution, or ideally, before they receive a distribution. In this regard, under section 1457(3) of the Czech Civil Code for example, a person only becomes a beneficiary (and thus has rights to receive income from the trust) by registration in the trust register (not necessarily in the register of beneficial owners).

A more transparent alternative would be to require all discretionary beneficiaries to be registered by virtue of appearing in the trust deed (as soon as the trust is created), rather than waiting until they are about to receive a distribution. However, given the risks of discretionary trusts, both in terms of secrecy and shielding assets against creditors, the Directive could consider prohibiting discretionary trusts in the EU.

3.2.1 Indirect distributions

In order to create secrecy, individuals may not be mentioned in the trust deed but still benefit from the trust. This is the case for informal or indirect distributions. For instance, the OECD has [proposed](#) amendments to the CRS to ensure that recipients of indirect distributions should also be considered beneficiaries (and beneficial owners of a trust): *“a Reportable Person will be treated as being a beneficiary of a trust if such Reportable Person has the right to receive, directly or indirectly (for example, through a nominee), a mandatory distribution or may receive, directly or indirectly, a discretionary distribution from the trust. Indirect distributions by a trust may arise when the trust makes payments to a third party for the benefit of another person. For example, instances where a trust pays the tuition fees or repays a loan taken up by another person are to be considered indirect distributions by the trust. Indirect distributions also include cases where the trust grants a loan free of interest or at an interest rate lower than the market interest rate or at other non-arm’s length conditions. In addition, the write-off of a loan granted by a trust to its beneficiary constitutes an indirect distribution in the year the loan is written-off. In all of the above cases the Reportable Person will be person that is the beneficiary of the trust receiving the indirect distribution (i.e. in the above examples, the debtor of the tuition fees or the recipient of the favourable loan conditions)”* (p. 85).

Based on this explanation, the Directive should also clarify that any recipient of an indirect distribution should also be considered a beneficiary of the trust and thus registered as a beneficial owner.

3.3 Thresholds and complex structures

Based on the FATF Interpretative Note to Recommendation 10 on the criteria to determine the beneficial owners of a trust, the AMLD requires all trusts to register their beneficial owners without applying thresholds. It is not clear why both the FATF and the AMLD take such a broad approach in favour of transparency. One potential reason is that trust deeds may be so flexible that such a comprehensive approach prevents avoidance mechanisms. Another potential reason is that there is usually no register from which all parties of the trust are easily identifiable. In such case, the beneficial ownership register essentially replaces the function of the trust register (which does not usually exist).

As for complex ownership structures, the AMLD is silent on scenarios where a trust (or its trustee) is an owner of a company (i.e. the shares of a company are put into a trust), or where a trust party (e.g. trustee or beneficiary) is a legal person. In the former case, when a trust owns a certain percentage of a legal person, e.g. 30 %, such that it would have been identified as a beneficial owner if it were an individual, then the trust beneficial ownership definition should apply to determine who

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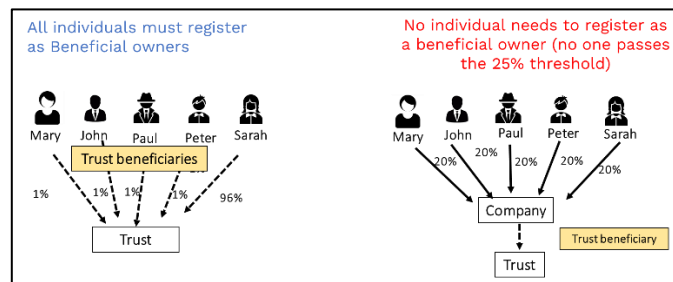
should be identified as the beneficial owner of the underlying company (given that trusts are not natural persons and cannot be considered beneficial owners). In such a case, by applying the beneficial owner definition for trusts, all settlors, trustees, protectors, beneficiaries and any other individual with effective control over the trust should be considered a beneficial owner of the legal person. This is not always explicitly established in law. In fact, some countries may limit the identification to the trustee or to anyone who controls the trust.

On the other hand, when a party to the trust is a legal person, absent any regulation, it is possible that countries would apply the corresponding criteria for the type of legal person, e.g. identify anyone with more than 25% of the shares, if a party to the trust is a company. However, this may result in creating secrecy by adding thresholds that were meant not to exist in the case of trusts. For instance, if five individuals have each 20 percent interest in a company which is the trust beneficiary, then none of the individuals will have to be identified as trust's beneficial owners because none of them would pass the 25 percent threshold to be identified as beneficial owners of the company to begin with. Although beneficial ownership definitions for companies may also include anyone with "control via other means", this may be difficult to prove or enforce. In such

cases, a senior manager may be reported as the beneficial owner of the trust. For this reason, to ensure full transparency on trusts' beneficial owners, it should not be enough to apply the general rules of legal persons in scenarios of complex ownership structures. Instead, rules should require that when a legal person, e.g. a company, is a party to the trust, then the beneficial owners of the company should be identified without applying any thresholds (e.g. any individual with at least one share or vote should be considered a beneficial owner).

If the general rules are applied, when a company is a party to a trust, the trust beneficial ownership register could simply retrieve the beneficial ownership information from the beneficial ownership register of companies. This way, those who hold more than 25% of the shares of the company may be identified as beneficial owners of the trust. However, if the most transparent scenario is implemented, where no thresholds apply, then it would not be enough to retrieve the information contained in the beneficial ownership register for companies, and trusts will have to register additional information, unless the beneficial ownership definition for legal persons changes and stops applying any threshold as proposed by some authors (see e.g. NEBOT paper "BO definition for companies – gaps and loopholes).

Figure 1: Consequences of combining trusts and legal persons



3.4 Access

Under the AMLD, while countries should ensure public access to beneficial ownership information for legal persons, in the case of trusts, access is only for those who may prove a legitimate interest as well as cases where a trust owns a non-EU company. This distinction seems to be related to the classification of trusts as legal arrangements rather than to a consideration of the risks or functions of trusts. Private foundations are the civil law equivalent of trusts in terms of uses, effects and control structure. In fact, the AMLD recognises this similitude, and under Art. 3, it also applies the definition of trusts' beneficial owners to private foundations.

(6) 'beneficial owner' means any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted and includes at least:

(...)

(b) in the case of trusts: (i) the settlor(s); (ii) the trustee(s); (iii) the protector(s), if any; (iv) the beneficiaries, or where the

individuals benefiting from the legal arrangement or entity have yet to be determined, the class of persons in whose main interest the legal arrangement or entity is set up or operates; (v) any other natural person exercising ultimate control over the trust by means of direct or indirect ownership or by other means;

(c) in the case of legal entities such as foundations, and legal arrangements similar to trusts, the natural person(s) holding equivalent or similar positions to those referred to in point(b);

However, based on the classification of private foundations as legal persons, their beneficial ownership information is publicly accessible. In contrast, trusts' beneficial ownership information requires a legitimate interest.

Despite the need for a legitimate interest, at least 12 EU countries have started or plan to grant public access to trusts' beneficial ownership information. These countries include Austria, Bulgaria, Croatia, Czechia, Denmark, Estonia, Germany, the Netherlands, Poland, Portugal, Slovenia and Sweden. However, some of these countries only give public access to residents (e.g.

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Croatia, Portugal and Sweden) or not on all trust parties (e.g. Czechia only includes information on the trustee). The most transparent case is found in Denmark, which

offers free, online and public access to the beneficial owners of trusts, as illustrated by the figure below (it also allows searches by type of entity).

Figure 2: Extract on a trust from the Danish beneficial ownership register

datacvr.virk.dk/enhed/virksomhed/42883921?fritekst=trust&sideIndex=0&virksomhedsform=95&size=1

The RR Discretionary Trust 3

CVR number	[REDACTED]
Address	[REDACTED] 6
Postal code and city	[REDACTED]
Start date	26.03.2019
Company form	Trust
Advertising protection	Yes - Terms of use
Status	active

[See all devices at the address](#)

+ Extended business information ?

- Ownership ?

Real owners

[REDACTED] [h](#)

UK
Is real owner as founder
Change date: 26.03.2019

[REDACTED] [er](#)

Taarbæk Strandvej 116
2930 Klampenborg
Denmark

3.5 Enforceability as a guiding legislative principle

As described above, trusts are required to register their beneficial owners in the EU whenever the trustee is located in the EU, or when the trust acquires real estate or establishes business relations in the EU. However, without information on the actual number of trusts which exist or operate in a country, registration becomes voluntary (self-reporting) and enforcement may be impossible. A similar conclusion was reached in a 2019 [paper](#) commissioned by the Australian Tax Office (ATO), a country where trusts are extremely integrated and relevant to the economy:

“A question of primary importance is whether the Income Tax Assessment Acts can be adequately enforced with current sources of information about trusts.... The analysis demonstrates that without more complete trust data there is an inherent complexity in better determining the potential size of the active trust population in any one financial year... in the context of a self-reporting system, this presents a unique and complex set of challenges for the ATO...”

Trusts are being used for a variety of purposes and in across various industries. Such heterogeneity means that without some regulatory oversight

it would become increasing difficult for the ATO to monitor and administer the taxations laws in relation to trusts. By comparison, the corporate structure is heavily regulated in Australia and yet trusts are just as prominent across as many industries and sectors...

Lack of trust registration and authentication requirements encourages opportunism and fraud on the part of taxpayers. Allegations that trusts exist and have certain terms may be based on falsified documents and/or false claims that constituent documents have been lost or destroyed. Distributive entitlements and/or persons’ statuses as trust beneficiaries may be changed prior to tax audits in order to conform with previous years’ tax returns” (pp. 89-106)

One could argue that enforcement could be facilitated indirectly by the real estate register, e.g. if trusts are prevented from registering their real estate unless they have first registered their beneficial ownership information. The same could apply to obliged entities and designated non-financial institution businesses and professionals (DNFBPs). For instance, lawyers, notaries or professional trustees could be prevented from engaging or doing transactions with trusts unless the trust has registered its beneficial owners. However, enforcement would still be challenging and would require audits to ensure that obliged entities are complying with the Directive.

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One solution would be to require trusts to “incorporate” in order to have legal validity in the EU. Although many countries, especially common law countries, may find this requirement contrary to the (legal) ways in which trusts were created for centuries, the fact is that the fight against financial crimes has changed many features of the way of doing business. Corporate anonymity, bearer shares or the possibility to open an anonymous bank account with a million dollars in a suitcase used to be commonplace. This is no longer the case. Establishing new mechanisms for compulsory registration of trusts (just as it happens with companies and private foundations) would be beneficial to find out about trusts which have other types of connections to the EU which are not yet covered by the Directive like those being governed by the laws of an EU country or having a local settlor, protector or

beneficiary. Interestingly, one EU country already applies this. Czechia requires under Art. 1448.2 and 1451.2 of the Civil Code that trusts must be registered in order to be “created” (giving registration a “constitutive effect”, meaning that rights start from the moment of creation). This means trusts in Czechia have their own identification number and a file in the register, which is appreciated by Czech professional trust service providers. The trust can thus be easily identified and proven, and this greatly simplifies dealings with third parties. Another case, though indirect, is France. Although France does not explicitly mention trust registration as a pre-requisite for legal validity, it establishes the sanction of nullification in cases of non-compliance with the registration of beneficial owners (amended Art. 2019, 4th paragraph of the French Civil Code).

4. Policy changes

4.1 Policy recommendations

Based on this paper's analysis, the following recommendations should be considered by EU countries:

1. a) Beneficial ownership registration should be extended to any domestic trust (governed under the laws of an EU country) or to any trust which acquires or already holds real estate or which establishes (or already has) business relations.

b) There should be no exceptions for any type of trust from the requirement to register beneficial owners.

c) Trust registration could then be extended to any trust holding any registrable asset (not just real estate) or where any party (not just the trustee) is resident in an EU country.

2. A domestic or foreign trust's legal validity should be contingent upon the trust having registered its beneficial owners.

Alternatively, a trust's legal validity could be subject to "registration/certification of existence" and then authorities should check whether all "registered/certified" trusts have filed their beneficial ownership registration, as is the case with legal persons. "Unregistered" trusts should be prevented from engaging in any transaction (e.g. opening a bank account), or any distribution from an "unregistered" trust

could be considered unjustified or illegal enrichment. Likewise, trustees would be considered the absolute owners of the assets that they hold as legal owners on behalf of the trust (this means that the personal creditors of the trustee would have access to the trust assets as if they belonged to the personal wealth of the trustee).

3. Where a legal person is a party to the trust, the Directive should clarify who has to be identified as a beneficial owner. Ideally, rules ought to clarify that all beneficial owners of that legal person should be identified as beneficial owners of the trust without applying any thresholds that would otherwise generally apply (e.g. "more than 25% of the shares" would become "any natural person with at least one share or vote over the legal person which is party to a trust"). In other words, given that the beneficial ownership definition for trusts cannot include thresholds, such thresholds should not be allowed to be applied throughout the ownership or control structure of the trust.

4. Discretionary trusts should be prohibited. Any beneficiary, including a recipient of an indirect distribution, should first be registered before they may receive a direct or indirect distribution.

5. There should be public access to beneficial ownership information on trusts,

just as is already the case with other legal vehicles which are used for the exact same purposes as trusts, such as private foundations and other legal persons (as explained above, many EU countries are or will offer public access to trusts' beneficial owners).

4.2 The AML Package

On July 20, 2021, the European Commission presented a package of legislative proposals to strengthen the EU's rules to tackle money laundering and to counter the financing of terrorism known as the "AML Package".

Although the AML Package does not propose specific changes on trusts, this could be an opportunity to promote some of the changes mentioned above. For this purpose, the following recommendations could be proposed:

- Art. 43 of the proposed [Regulation](#) in the AML Package could be amended as follows (proposed recommendations in bold):

Identification of beneficial owners for express trusts and similar legal entities or arrangements. In case of express trusts, the beneficial owners shall be all the following natural persons:

*(a) all settlors, including the **economic and legal** settlor(s);*

(b) the trustee(s);

(c) the protector(s), if any;

(d) the beneficiaries or where there is a class of beneficiaries, the individuals within that class that receive a benefit from the legal arrangement or entity, irrespective of any threshold, as well as the class of beneficiaries. However, in the case of pension schemes within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council 56 and which provide for a class of beneficiaries, only the class of beneficiaries shall be the beneficiary;

(e) in case any of the parties in (a), (b), (c) or (d) are legal vehicles or nominee natural persons, the beneficial owners of each party shall be identified applying the corresponding rules but without thresholds (e.g. any natural person holding one share of the corporate trustee)

(f) any other natural person exercising ultimate control over the express trust by means of direct or indirect ownership or by other means, including through a chain of control or ownership. In this case, no thresholds shall apply in the beneficial ownership definition of any legal person integrated into the ownership chain.

(g) discretionary trusts or any trust where a party may have discretion to choose who is to become a beneficiary or receive a distribution shall not be permitted in the EU. Any person must first be registered as a beneficial owner in order to receive a distribution.

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(h) any person who receives an indirect distribution shall also be considered a beneficiary of the trust.

- Art. 48 of the proposed [Regulation](#) in the AML Package could be amended as follows (proposed amendments in bold):

*Foreign legal entities **and domestic or foreign** arrangements*

*1. Beneficial ownership information of legal entities incorporated outside the Union or of express trusts or similar legal arrangements **created according to or governed by the laws of a Member State** or administered outside the Union shall be held in the central register referred to in Article 10 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final] set up by the Member State where such entities or trustees of express trusts or persons holding equivalent positions in similar legal arrangements:*

*(a) enter into **or hold** a business relationship with an obliged entity or enters into any contract or economic relationship with a local legal vehicle;*

*(b) acquire **or hold** real estate or any other registrable asset including vessels, aircrafts, cars, or art in their territory.*

[Option A: For a domestic or foreign trust to obtain legal validity in the EU, it shall be registered in a Member State's beneficial ownership registry.]

[Option B: For a domestic or foreign trust to be able to engage in financial transactions, hold assets, or make or receive payments to or from EU residents, it shall be registered in a Member State's beneficial ownership registry.]

- Art. 12 of the proposed [Directive](#) in the AML Package could be amended as follows (proposed amendments in bold):

Specific access rules to beneficial ownership registers for the public

1. Member States shall ensure that any member of the general public has access to the following information held in the interconnected central registers referred to in Article 10:

*(a) in the case of legal entities **or express trusts or similar legal arrangements**, at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held,*

~~(b) in case of express trusts or similar legal arrangements, the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held, provided that a legitimate interest can be demonstrated.~~

Conclusion

The AMLD treats trusts differently from legal persons. Although this may be related to the more generalised use and prevalence of legal persons over trusts in most EU countries (compared to most common law countries), the disparity in legal frameworks between legal persons and trusts creates secrecy risks that could be exploited to engage in money laundering.

Even in the scenario where the AMLD is fully implemented and complied with in every country, there remain challenges to trust transparency, including the limited scope of trust registration, the lack of provisions on complex situations affecting the beneficial ownership determination, the restricted access to information, and the lack of information on the number of registrable trusts that operate in each EU country.

The findings of the Financial Secrecy Index underscore these secrecy risks by suggesting that some EU countries are not complying with the scope of trusts under registration, the conditions which should trigger registration, or the beneficial ownership definition.

In contrast, some EU Members have implemented best practices which could be replicated in other countries. For instance, Denmark offers free, online and public access to trusts' beneficial ownership information, while Czechia and France

ensure trust registration by means of legal recognition or sanctions.

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