

Urgent call to clarify AML/CFT beneficial ownership policy for public benefit foundations and NPOs – October 2023

We strongly believe in **the important fight by the European Union and international and national policy makers against money laundering and terrorism financing**. We have however observed that the current beneficial ownership policy and its implementation at the national level have **created legal uncertainty and have had unintended chilling consequences on the NPO sector including the philanthropic and foundations' sector**. Infact, in the context of the implementation of the 5th AML/CFT Directive, some Member States have considered **associations and foundations as "obliged entities"**, some have suggested that **grant recipients/beneficiaries of also public benefit foundations/associations should be listed as "beneficial owners" etc.**

Notwithstanding our commitment to the fight against money laundering and terrorism financing, we urgently call on EU policy makers to **clarify and simplify key wording in the new EU AML/CFT package proposals with regards to beneficial ownership (BO) policy to avoid unintended consequences on legitimate NPOs and public benefit foundations` actions.**

The **current definition of BO creates legal uncertainty since it is not clear how the "beneficial ownership" concept should be applied to public benefit legal entities such as associations and foundations and public benefit trusts**. NPOs and public benefit foundations are set up to benefit the general public and not private interests, hence they differ from private interest structures which benefit individual family members.

We have **flagged our concerns on several occasions towards relevant policy makers during the course of last two years**, and are, in this spirit **calling on you to consider the following approaches with a view to clarify and simplify BO policy for NPOs and public benefit foundations** (legal entities and legal arrangements, where they are similar to express trusts).

1. Clarify that all legal entities (including associations and foundations) fall under Article 42

We suggest to clarify **that all legal entities (including not for profit associations and foundations) fall under Article 42 of the Commission proposal for a AML/CFT Regulation, with a view to list as "beneficial owners" the ones that own, have rights on the assets or that "control" or direct the organisation**. For public benefit organisations (be they associations or foundations) **it would then be clear that the beneficial owner would be the one directing the organisation** (board or senior management) - and not

a broad group of beneficiaries - in analogy with the rules set by the Commission for corporate entities (Article 42.1 (b)/(c) of the Commission Proposal).

2. Clarify the notion of “beneficial owners” of express trusts and similar legal entities or arrangements in Article 43

The current Commission proposal for a Regulation and proposal amendments by the Council list a series of natural persons as beneficial owners of express trusts (and similar legal entities and arrangements) and it appears **that they would need to be listed cumulatively irrespective of whether those individuals exercise control over the organization and/or own assets/have rights on the assets.** This would lead to unnecessary listing of information of individuals who have no rights on the assets or control over the organisation and hence not be proportionate.

Hence, **rather than requesting (in the case of express trusts and similar legal entities or arrangements) a cumulative list of natural persons which may have or not have control and/or have rights on the assets or own the organisation, it should be clarified that in the case of express trusts, and other similar legal entities or arrangements the beneficial owner shall be one or more of the listed natural persons but only where they own, exercise control over the express trust and/or have rights on the assets of the express trust (or similar legal entity or arrangement).**

In addition, we strongly **suggest that the requirement foreseen by Article 42.4 of the Commission Proposal, according to which "the Commission shall make recommendations to Member States on the specific rules and criteria to identity the beneficial owner(s) of legal entities other than corporate entities", be mirrored in Article 43 for express trusts and legal entities and legal arrangements similar to express trusts.** We believe that this would not only ease Member States` obligations in this field, but also **contribute to a more harmonised implementation of the legislation, thus making it more effective.**

We therefore suggest the following changes to Article 43 of the Commission Proposal:

1. *In the case of express trusts, the beneficial owners ~~shall be (all)~~ can be any of the following natural persons **where they own, exercise control over the express trust and/or have rights on the assets of the express trusts:***

(a) the 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 **and express trusts and similar legal entities or arrangements which are set up for a non-profit or charitable purpose** which provide for a class of beneficiaries, only the class of beneficiaries shall be the beneficiary;

e) 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.

2. In the case of legal entities and legal arrangements similar to express trusts, the beneficial owners shall be the natural persons holding equivalent or similar positions to those referred to under paragraph 1 **where they own, exercise control over the organisation and/or have rights on the assets of the entity.**

Member States shall notify to the Commission by [3 months from the date of application of this Regulation] a list of legal arrangements and of legal entities, similar to express trusts, where the beneficial owner(s) is identified in accordance with paragraph 1.

[...]

4. The Commission shall make recommendations to Member States on the specific rules and criteria to identify the beneficial owner(s) of legal entities and legal arrangements similar to express trusts by [1 year from the date of application of this Regulation]. In the event that Member States decide not to apply any of the recommendations, they shall notify the Commission thereof and provide a justification for such a decision.

3. Explanatory comments around the need to clarify that individual grant recipients of NPOs are not beneficial owners

Of particular concern for public benefit organisations is the fact that the draft Regulation also **includes ‘beneficiaries’ in the list of persons identified as BOs for express trusts (and similar legal arrangements and entities)**. As has occurred in the implementation of the 5th AML/CFT directive, Member States will likely interpret this as an obligation for NPOs and public benefit foundations (where they are similar to express trusts) to report on all their **grant or scholarship recipients as BOs**. This would be a **clear deviation from the real purpose to fight money laundering and terrorism financing** and to identify the persons who own or control an organisation. Public benefit foundations should not be required to list hundreds or more of their grant recipients (part of the general public) **who exercise no control over the organisation, have no rights on the assets and are distant to the running of the organisation**.

The Council approach of December 2022 which enables individual Member States to only require the listing of a class of beneficiaries after having assessed a low risk of abuse of certain public benefit

organisations **unfortunately does not provide for a clear-cut solution and a uniform approach.** Member States would potentially find different solutions for the public benefit sector and this would counteract the desire to simplify and harmonise the legislation.

The approach also does not seem in line and balanced with the rest of Article 43. The current Article 43.1 of the Commission Proposal, which allows that beneficiaries of a recognised pension scheme can be identified as a class without any requirement for the individual pensioners to be named, should at least also be applied to public benefit organisations (where they are similar to express trusts). We argue for this **treatment to be extended to public benefit organisations on the basis that their beneficiaries are even more distant than those of a pension scheme from an arrangement to benefit one or more specified individuals.** This class-wise listing solution with respect to beneficiaries should be available to public benefit foundations/associations insofar as any listing of beneficiaries is required throughout the Regulation.

In fact, it is important to consider the **difference between the beneficiaries of private interest trusts versus public benefit purpose trusts.** For an express trust to be valid it must have beneficiaries that are either living or are born before the trust terminates. In the case of private trusts the beneficiaries are identified either as named individuals or by a link to a named individual (e.g. the children of John Smith). **In the case of a public benefit purpose trust the beneficiaries are the general public that benefits from the fulfilment of the trust's purposes.**

This distinction is reflected in the details of Beneficial Owners that can be provided when the trust is created, because a typical charitable trust will only be able to report the class of beneficiaries that it is intended to benefit without being able to name the individuals concerned. For example, a local housing charity might describe its beneficiaries as "those inhabitants of the City of Dublin that are in need of the provision of adequate housing for their ordinary day to day living requirements". It is **certainly not the intention to collect information on grant recipients/ scholarship recipients under the point "beneficiaries" for public benefit organisations (where they are similar to express trusts), since these have no rights on the assets and no decision power on the use of the assets.**

To address the issues presented so far, we suggested the above clarification of wording for article 43 to require that those listed as Beneficial Owners should foremost have the function to own, control the organisation and/or have rights on the assets (suggested changes are in bold and highlighted).

We also welcome alternative solutions to this as long as it is clarified that it is not required to register a large number of grant recipients under a public benefit purpose as BOs but that the BO is always the one that either owns, controls or has rights on the assets.

3. Consider a clarification of the concept of express trust

The concept of express trust, which is repeatedly recalled in the AML/CFT Regulation, is not well known to many EU jurisdictions, which creates the risk of further uncertainty on the application of BO rules. As a matter of fact, this concept is more prevalent in common law countries, and much less known in EU countries following civil law. Member States will hence need more guidance as to the definition of express trusts and which legal arrangements or legal entities they may consider similar to express trusts.

4. Access to BO information

Concerning Beneficial Ownership Transparency in the AML/CFT Directive Proposal, we recognize the **importance for BO information to be available to competent authorities and to those with a legitimate interest.** In line with the judgment of the European Court of Justice of 22 November 2022, we believe that it is of utmost importance for EU policymakers to **ensure that the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter resulting from the general public's access is strictly necessary to prevent money laundering and terrorist financing and proportionate to the aim pursued.** We ask that the future 6th AML/CFT Directive is fully compliant with the Court's ruling.