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Philanthropy Europe Association

CIVIL SOCIETY EUROPE

European Center for Not-for-Profit Law

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Urgent call to clarify and simplify AML beneficial ownership policy for public benefit foundations and NPOs in light of new proposals – March 2023

Taking into account the current negotiations around the new EU Money Laundering Package and the December 5th Council position and current negotiations on the matter, we urgently call on EU policy makers to clarify and simplify some of the wording in the new AML package proposals to avoid unintended consequences on legitimate public benefit organisations` actions.

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 elements of the current policy and its implementation at the national level have created legal uncertainty in their application and have had unintended chilling consequences on the NPO sector including the philanthropic and foundations' sector.

Our recent mapping revealed that **it was not clear to Member States how to implement the current Directive with regard to our sector, which has led to overregulation**. Some Member States are now **considering associations and foundations as "obliged entities"**, several suggest that **grant recipients/beneficiaries of also public benefit foundations/associations should be listed as "beneficial owners" etc.**

We have flagged our concerns on several occasions towards DG FISMA and EP rapporteurs during the course of last year and have made concrete suggestions for a clearer wording in particular on the beneficial ownership policy. We are pleased to see that the December Council Position is suggesting to clarify the identification of beneficial owners of legal entities similar to express trusts and providing for a distinct treatment of such organisations and express trusts when set up for non-profit or charitable purposes. However, the suggested approach appears more complex and less unified than required and links this treatment to national risk assessments, creating the risk of further legal uncertainty. We are in this spirit calling on you to consider the following approaches with a view to clarify and simplify the BO policy for public benefit foundations and NPOs.

1. Clarify that beneficial owners are the ones that own, have rights on the assets or that control the organisation

The current definition of the 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. A distinction is needed between those cases where there is someone identifiable

who "owns" the organisation or who benefits financially from the organisation (other than receiving a scholarship grant of a public benefit organisation) versus other cases where information merely on the ones 'directing or controlling' the organisation can be collected.

NPOs and public benefit foundations are set up to benefit the general public and not private interests, for example family members or other private interests, hence they differ from for-profit and private interest structures. Public benefit foundations are on top of that self-owned entities with their own governing bodies. Founders of public benefit foundations generally have no decision-making powers in the foundations they created. The governing bodies act as stewards and are bound to the public benefit purpose of the organisation as defined in the statutes. The definition of BO as currently drafted is therefore ill suited for public benefit foundations and NPOs.

The current draft Regulation and new suggestions for 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 heavy administrative burden and unnecessary listing of information of individuals who have no rights on assets or control over the organisations.

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, foundations similar to express trusts and other similar legal entities or arrangements:**

> ***one or more of the following natural persons should be listed as BO BUT ONLY if they own assets or have rights on the assets or exercise ultimate control over the organisation:***
>
> *(a) the settlor(s);*
> *(b) the trustee(s);*
> *(c) the protector(s), if any;*
> *(d) the beneficiaries*
> *(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. 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 entities, which has created a lot of legal uncertainty and overregulation at the Member State level. During the implementation of the current 4/5th Directive several EU countries have considered the obligation for

NPOs and public benefit foundations to report on all their **grant or scholarship recipients as BOs**. This has led to uncertainties and privacy rights concerns and is a deviation from the real purpose to fight money laundering and terrorism financing and to identify the persons who own or control an organisation. Some foundations felt 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 December 2022 approach to enable 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 does unfortunately 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 approach.

The approach also does not seem in line and balanced with the overall concept. The current Article 43.1 of the Commission draft, 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. 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.

In fact, it is important to consider the difference between the beneficiaries of private 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, 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 suggest the following clarification of wording for article 43 to require that those listed as BOs should foremost have the function to own, control the organisation and/or have rights on the assets (suggested changes are in bold and highlighted in yellow and green*).*

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SUGGESTED WORDING OF ARTICLE 43

Article 43

Identification of beneficial owners for express trusts and similar legal entities or arrangements

1. *In 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****:*

   (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.*

   3. The Commission is empowered to adopt, by means of an implementing act, a list of legal arrangements and legal entities governed under the laws of Member States which should be subject to the same beneficial ownership transparency requirements as express trusts. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 61(2) of this Regulation.

In the case that the suggestion for limiting the BO concept to the ones that own, have rights on the assets or control/direct the organisation were not to be accepted, we believe it is crucial to at least consider a

different wording of Article 43, in that it considers beneficiaries (see suggestion for Article 43.1 (d) highlighted in green above). As already observed, in fact, in the case of express trusts and similar legal entities or arrangements which are set up for a non-profit or charitable purpose , it is only possible to report the class of beneficiaries that the entity is intended to benefit without being able to name the individuals concerned.

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 Regulation, is not well known to all EU jurisdictions, which creates the risk of further uncertainty on the application of BO rules.
We ask EU Institutions to consider a clarification of the definition as currently provided for by the Council position on the Regulation, as to clarify whether this also refers to public interest structures.

4. Clarify points related to public benefit crowdfunding platforms

We are of the opinion that those crowdfunding platforms, which are exclusively set up and used for public benefit purposes should be excluded from the definition of 'obliged entities' according to the draft Regulation considering that the risk of abuse is low. It could also be left to the level of Member States to decide to exempt providers of crowdfunding platforms used exclusively for public benefit purposes because of the proven low risk posed by the nature and, where appropriate, the scale of operations of such services. Further evidence would also be required to substantiate any claim that these types of platforms are particularly prone to widespread AML abuses.

If public benefit crowdfunding platforms were to be included in the EU AML regime without exemption, it would result in high compliance costs for these providers and reduced flow of capita across borders. Ultimately there could be a chilling effect on fundraising, giving and philanthropy, as well as potential market concentrations due to increased costs for providers and higher entry barriers for new providers. Given the importance of how they underpin giving and philanthropy currently and in the future, we suggest to exempt public benefit 'crowdfunding' from the definition of obliged entities.

5. Ensure that the new AML Directive is fully compliant with the ECJ`s ruling on access to BO information for the general public

Concerning Beneficial Ownership Transparency in the AML 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 European Court of Justice`s judgment 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 sixth anti-money laundering Directive is fully compliant with the Court's ruling.

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