

TASC submission to Open Government Partnership on Ireland's National Action Plan 2016-2018

Consultation Theme: Strengthened Governance and Accountability

This submission from TASC – Think Tank for Action on Social Change – is made to the Department of Public Expenditure and Reform as part of its consultation on Ireland's second National Action Plan under the Open Government Partnership. It focuses on two separate areas: Improving Anti-Corruption Measures; and Increased Transparency and Open Data.

1. Improving Anti-Corruption Measures

At the global Anti-Corruption Summit held in London in May 2016, Ireland made commitments to establish a central register of beneficial ownership information for all companies, to explore the feasibility of making such a register public, and to establish a central register of beneficial ownership information for certain other legal entities.¹

The setting up of a central register of beneficial owners – the ultimate owners of companies and other legal entities – is part of Ireland's implementation of the EU's Anti-Money Laundering Directive (EU 2015/849).² Ireland must implement the rules contained in the directive into national law by June 2017.

Increasing transparency about who owns and controls companies is a vital step in combatting corruption and creating an environment of trust and accountability. For example information asymmetries were a common thread of the recent 'financial crash', whether this related to risk, the nature of borrowers or indeed the ownership of assets and collateral.

Within the context of its membership of the Open Government Partnership, Ireland has an opportunity to put in place a register of beneficial ownership that is comprehensive in its scope, publicly available, and searchable at zero or minimal cost. Public inspection and wide usage will result in a consequent improvement in the accuracy and reliability of a register, as well as its usefulness.

This submission highlights some key issues to be considered in introducing a central register of beneficial ownership in Ireland, and makes specific recommendations. It also highlights

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522748/Ireland.pdf

² http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2015_141_R_0003&from=EN

some areas in which Ireland may usefully learn from the experience of the UK, which is one of the first countries to implement a central register of beneficial ownership.

Register of Beneficial Ownership – Key Issues and Recommendations

Trusts

A major issue arises in relation to the beneficial ownership of trusts. Trusts, in particular charitable trusts, are widely used in Ireland and elsewhere in the ownership of special purpose vehicles also referred to by European Central Bank and Central Bank of Ireland as Financial Vehicle Corporations (FVCs). Some of these structures have received considerable publicity in Ireland, in particular firms that purchased distressed property loans.

Chains of ownership

Chains of ownership may make identification of beneficial owners difficult. Particularly if the ownership chain involves countries with secrecy jurisdictions such as the Cayman Islands. UK guidelines allow “under certain circumstances” ownership/control of a company to appear on the register of the owner/controller company (Department for Business, Innovation and Skills, 2015, par. 21.). Such exemptions if widespread could make identification of owner/controller difficult and time consuming (Department for Business, Innovation and Skills, 2015, par. 21.).

Charges

In the UK there are no charges for access to data filed at Companies Registration Office. In Ireland there is a charge of €2.50 per document (this includes a PDF which is available by email). This means that company searches involving hundreds of documents are expensive.

To be effective a register of beneficial ownership needs to be comprehensive, publicly available, and searchable at zero or minimal cost.

Objections to Disclosure

Periodically some organisations representing business have lobbied for less disclosure. Reasons often given are:

(1) The need to reduce the regulatory burden on business. This argument has resulted in much reduced financial information in that companies that are defined as small have a much reduced requirement to file publicly available information. Non-disclosure or partial disclosure benefits individual companies but at the expense of those who trade with these companies, employees, and activities that are dependent on widely available information

such as industry analysis. Lenders, although able to access specific information, are also at a disadvantage in having partial information about an industry or sector. Exemptions on disclosure for small companies may also result in asset splitting to avoid disclosure.

(2) A second argument relates to information that should not be disclosed because it may pose a security risk. This argument has been used to prevent publication of names and addresses of company directors. There is however little evidence that information disclosed in company registration documents has resulted in physical injury or unlawful entry of the disclosed person's residence. Nonetheless, the UK Government proposes not to publish the residential address of Persons with Significant Control (PSC, see below), in line with company law in the UK, which does not require disclosure of directors' residential addresses. This information may be accessed on request by specified bodies, for example revenue authorities. In contrast in Ireland there is no general exemption from disclosure of a director's address. This is possible, but only if certified by the Garda that disclosure would constitute a safety or security risk. Examples of such disclosure are difficult to find, perhaps because of the widespread use of nominee directors in Ireland.

(3) A final point is that in some cases a company may not know who the beneficial owners are and may also not be in a position to find out. This is an issue that has led to some concerns in the UK as these are likely to be entities that are of interest to regulatory and other bodies (Department for Business and Innovation Skills, 2013).

These issues, and other issues relating to the accuracy of data submitted to a register of beneficial ownership, are most likely to be noted with a register which is available for public inspection on a web portal with minimum costs. Public inspection and wide usage will result in a consequent improvement in the accuracy and reliability of a register, and its usefulness.

Persons of Significant Control

The UK's register is of "persons with significant control" (PSC) over companies, trusts and other legal entities. Companies are required to send this information to Companies House (the equivalent of the Irish Companies Registration Office) with their confirmation statement (which replaces the annual return) or on incorporation from 30th June 2016 onwards.

Companies House maintains the PSC information in a central register, which is available to view online. UK Government guidelines³ state:

A PSC is an individual who meets any one or more of the following conditions in

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515721/Guidance_for_PSCv2.pdf

relation to a company:

- (i) Directly or indirectly holding more than 25% of the shares (sections 5.1 and 5.4);
- (ii) Directly or indirectly holding more than 25% of the voting rights (sections 5.2 and 5.4);
- (iii) Directly or indirectly holding the right to appoint or remove the majority of directors (sections 5.3 and 5.4);
- (iv) Otherwise having the right to exercise, or actually exercising, significant influence or control (section 5.5);
- (v) Having the right to exercise, or actually exercising, significant influence or control over the activities of a trust or firm which is not a legal entity, but would itself satisfy any of the first four conditions if it were an individual (section 5.6).

It remains to be seen whether this approach raises issues as to who has “significant control,” including scope for artificially avoiding the definition of a “PSC”.

2. Increased transparency and open data

Legislative transparency – a legislative footprint

Ireland's first OGP National Action Plan 2014-2016 contained a commitment to: “introduce a ‘legislative footprint’ in relation to current legislative initiatives, published on each Department’s website including details of publication of general schemes, any consultation documents, publications of draft Bills, pre-legislative scrutiny by Oireachtas Committees, submissions received and meetings held with stakeholders, etc.”⁴ In the government’s end-term assessment report published in September 2016, this commitment was described as completed.⁵

The use of an effective legislative footprint as a tool to enhance transparency, integrity and accountability in public policy is still a relatively new and evolving concept in Ireland and Europe. There is scope, in the context of Ireland’s second OGP National Action Plan, for Ireland to return to its original commitment by developing a unique dedicated tool that can be applied uniformly to all legislation.

Currently, a ‘legislative footprint’ of sorts can be discerned by examining a variety of official sources. Individual government departments publish information about legislative initiatives on their respective websites. While details vary from department to department,

⁴ Department of Public Expenditure & Reform, Open Government Partnership Ireland National Action Plan 2014-2016, July 2014, Action 3.2, page 29.

<http://www.opengovpartnership.org/sites/default/files/OGP%20National%20Action%20Plan.pdf>

⁵ Department of Public Expenditure & Reform, Ireland’s Open Government Partnership National Action Plan 2014-2016, End-term Self-Assessment Report.

in many cases they include draft general schemes of Bills, consultation documents and submissions received. In addition, some government departments publish official diaries detailing meetings held by Ministers and senior officials with interest groups and others. Some of these meetings relate to legislative proposals. Details of certain stakeholder engagement on legislation can also be found on Ireland's online register of lobbying activities. Finally, the Oireachtas website carries the PDFs of Bills as they pass through the five formal stages of becoming an Act. Its committee pages may also publish documents related to pre-legislative scrutiny activities.

Taken together, these separate resources and tools can provide insights into how particular pieces of legislation were developed and shaped, as well as allowing citizens to see the formal outcomes of such activities in terms of Bills in their different stages and, ultimately, Acts of the Oireachtas.

However, there are important differences between legislative footprints and the resources outlined above, including those which increase transparency in relation to lobbying. For example, the notion of a legislative footprint tool goes beyond the general information found on the lobbying register. In addition, when it comes to legislative footprints, as distinct from the lobbying register, responsibility for disclosing information falls on public officials, parliamentarians and members of government.

In practical terms, a legislative footprint should take the form of an online annex to each piece of legislation, detailing in one place who has influenced it, how and when, and providing links to relevant materials.

There remains scope for a dedicated legislative footprint tool to be developed in the context of Ireland's second OGP National Action Plan.

References

Department for Business Innovation & Skills (2015), The Register of People with Significant Control: Scope, Nature and Extent of Control, Fees, The Protection Regime and Warnings and Restrictions Notices: Government Response.

Department for Business Innovation & Skills (2013), Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business, Discussion Paper, July, 2013.

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