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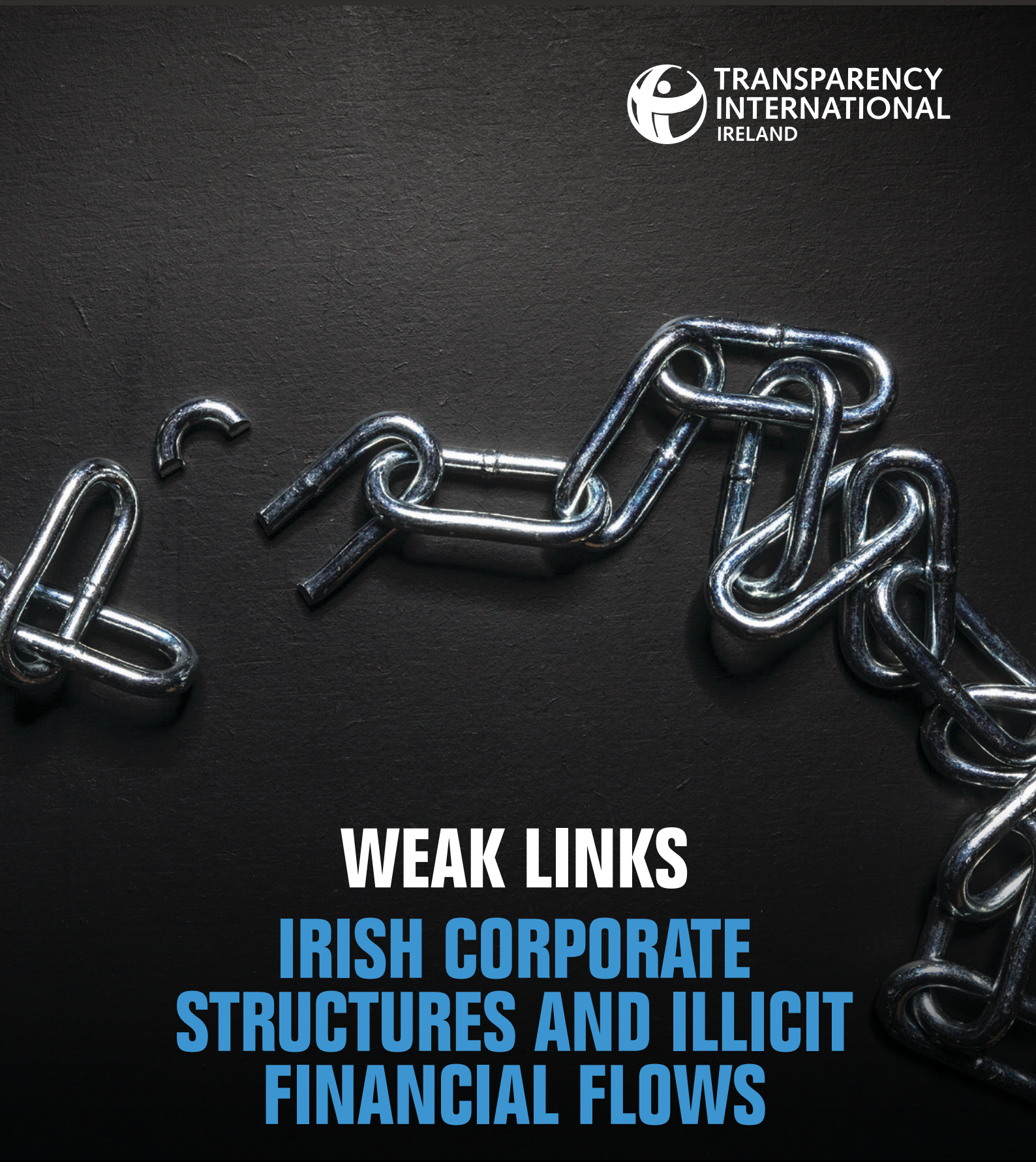

WEAK LINKS

IRISH CORPORATE STRUCTURES AND ILLICIT FINANCIAL FLOWS

Exposing Risks and Closing Gaps in Ireland's Legal Framework to Combat International Money Laundering

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CONTENTS

ABBREVIATIONS & ACRONYMS

AML/CFT	Anti-money laundering / Countering the financing of terrorism
AMLD	Anti-Money Laundering Directive
BEPS	Base Erosion Profit Shifting
BO	Beneficial ownership
CEA	Corporate Enforcement Authority
CJEU	Court of Justice of the European Union
CRO	Companies Registration Office
CT	Corporation tax
DETE	Department of Enterprise, Trade and Employment
DoF	Department of Finance
DoJ	Department of Justice
EBITDA	Earnings before interest, tax, depreciation and amortisation
ECB	European Central Bank
ECCTA	Economic Crime and Corporate Transparency Act 2023 (UK)
EEA	European Economic Area
EU	European Union
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
FSB	Financial Stability Board
FVC	Financial Vehicle Corporations
GDPR	General Data Protection Regulation
GNECB	Garda National Economic Crime Bureau
IFFs	Illicit financial flows
IFSC	Irish Financial Services Centre
ILP	Investment Limited Partnership
IMF	International Monetary Fund
KYC	Know Your Customer
LP	Limited Partnership
ML/TF	Money laundering / terrorist financing
OECD	Organisation for Economic Cooperation and Development
ODCE	Office of the Director of Corporate Enforcement (now CEA)
OFI	Other Financial Intermediaries
PFLP	Private Fund Limited Partnerships (UK)
PPSN	Personal Public Services Number
RIA	Regulatory Impact Analysis
SPE	Special Purpose Entity
SPV	Special Purpose Vehicle
TCSP	Trust and Company Service Provider
TI	Transparency International
UK	United Kingdom
UNODC	United Nations Office on Drugs and Crime
US	United States
VAT	Value Added Tax

INTRODUCTION

In 2021, Transparency International (TI) Ireland published the 'Safe Haven?' report, which assessed Ireland's framework for preventing, detecting and recovering the proceeds of foreign corruption.[1] The report concluded that, despite having laws and institutions in place for asset recovery, and showing a consistently strong response against the proceeds of domestic criminality, Ireland's willingness to take robust action against corruptly obtained foreign assets remained unproven – particularly in light of the country's fast-emerging role as a key international financial centre.

TI Ireland has not been alone in identifying a disparity between the State's impressive record against domestic criminal assets and its reluctance to acknowledge or respond sufficiently to the risks posed by vastly increased volumes of international capital flowing through the Irish financial system.[2] In 2022, as part of an assessment of the Irish financial sector, the International Monetary Fund (IMF) found that 'Ireland faces significant and increasing threats from foreign criminal proceeds' due to the rapid emergence of Ireland's position as an important international financial centre.[3] Whilst acknowledging that the State demonstrated a 'deep' understanding of *domestic* money laundering (ML) risks, the IMF noted that authorities' understanding of *transnational* ML risks had yet to catch up with the fast-changing reality of Ireland's role within the global financial system. To illustrate the scale and pace of this change – and the extent of attendant risks – the IMF highlighted that:

- Total financial sector assets had increased by 30 percent between 2017 and 2020 to €6.57 trillion – largely because of growth in investment funds, 'a sector particularly vulnerable to ML';
- Cross-border payments via Ireland had increased at an even higher rate – 'more than threefold from an already high base, a drastic change from the stable flows over the previous years';
- Financial flows from Ireland to offshore financial centres had increased fivefold in value since 2017 – jurisdictions that pose particular ML risks due to their often-lax AML controls.[4]

It is important to acknowledge that the intervening years have seen improvements in Ireland's response to illicit finance. One of the key recommendations of both the 'Safe Haven' report and the government-commissioned Hamilton Review[5] was the creation of a strategic framework to combat corruption and wider economic crime, and Ireland's first ever national strategy was under active development at the time of writing. The Advisory Council on Economic Crime and Corruption – also created as a result of the Hamilton Review – meets regularly to review and advise on action across government.[6] The Garda National Economic Crime Bureau continues to deliver operational results against international money laundering connected to organised crime.[7] A requirement to provide certain registries with a Personal Public Service Number to verify identities has become law.[8] The Financial Action Task Force has re-rated Ireland as 'compliant' or 'largely compliant' in all but six of its 40 recommendations.[9]

“Each of these measures represent important milestones towards making Ireland a truly hostile environment for dirty money from overseas. However, achieving that aim will remain elusive as long as gaps exist in our legal framework that allow or facilitate bad actors to exploit Ireland’s financial system, processes and vehicles for their own illicit ends – whether that be laundering the proceeds of fraud, cyber-crime or trafficking, investing the proceeds of corruption, or evading sanctions.

Each of these measures represent important milestones towards making Ireland a truly hostile environment for dirty money from overseas. However, achieving that aim will remain elusive as long as gaps exist in our legal framework that allow or facilitate bad actors to exploit Ireland’s financial system, processes and vehicles for their own illicit ends – whether that be laundering the proceeds of fraud, cyber-crime or trafficking, investing the proceeds of corruption, or evading sanctions. And those gaps are likely to persist as long as policy-makers underestimate or play down the scale and urgency of the challenges raised by the likes of the IMF, tinkering with piecemeal reforms that have negligible impact in deterring and detecting illicit financial flows to the extent needed to protect Ireland’s financial system and reputation. Although the political instinct to advertise the benefits and minimise the risks of large-scale capital flows might be understandable in terms of bolstering short-term sectoral interests, over time such an approach incrementally increases Ireland’s vulnerability to the laundering of the proceeds of organised crime and corruption. This is particularly the case as other closely aligned jurisdictions acknowledge and respond to illicit finance by significantly enhancing their own legal and policy frameworks.[10]

This report, then, is an attempt to challenge the prevailing policy stasis by highlighting and exploring four specific gaps in Ireland’s legislative framework for protecting against illicit financial flows from overseas. The report does not claim that these are the only loopholes or deficiencies, or even that they are necessarily the most acute, but each has been identified by subject-matters experts – in some cases over several years – as helping to conceal, permit or enable illicit financial activities at scale via Irish corporate and financial vehicles or processes. Another observation is that, while each of these issues has previously been acknowledged by different authorities as important or high-risk in the context of illicit finance,[11] responses to date have been partial, delayed or insufficient.

Elspeth Berry's chapter, for example, analyses in detail the extensive reforms required to prevent the suspected large-scale abuse of Irish **limited partnerships** (LPs), including from high risk and secretive overseas jurisdictions. Though this issue was exposed by investigative journalists over five years ago and was acknowledged by the government as a concern at the time, the chapter explains how the recently published General Scheme on registration of LPs needs to be far more ambitious in its proposed reforms in order to dent the current attractiveness of these structures to illicit actors.

Paul Egan's chapter brings the perspective of a corporate lawyer to bear on the topic of **beneficial ownership** (BO) transparency, and in particular Ireland's response to the EU Court of Justice's infamous ruling on the matter in 2022. As well as critiquing Ireland's highly restrictive new regime governing access to BO registers, the chapter draws attention to the myriad ways – beyond solely AML – in which BO transparency helps to prevent illicit activities, and makes a compelling case for disclosure of corporate ownership and control to become a routine obligation under company law.

Reflecting the importance of journalists in exposing many cases of financial wrongdoing, John Mulligan's chapter draws on his experience uncovering the widespread abuse of Ireland's **company registration** system – including the State's initial response to his revelations and the adverse impact of fraudulent registrations on legitimate citizens and businesses. The chapter highlights how the vaunted 'good faith' approach to company registration undermined the integrity of the system, and questions the extent to which subsequent reforms have sufficiently addressed the extent of the problem.

Based on his long-standing academic research on **Special Purpose Entities** (SPEs), Jim Stewart outlines the common features of these complex structures, including their use of the controversial 'section 110' tax status, the extent to which SPEs form part of the 'shadow banking' sector in Ireland, how SPEs are measured, and the regulatory framework around SPEs at both domestic and European level. The chapter then explores how the scale, features and regulation of section 110 SPEs maps onto key risks to the Irish financial system in terms of banking failures, fraud and illicit money flows.

In drawing upon their different professional and academic disciplines, the four authors provide diverse perspectives on complex areas of law, policy and regulation, and offer reflections on how specific legal loopholes or regulatory deficiencies might be addressed. Taken together, there are also some common themes that emerge from their contributions. Foremost amongst these is the crucial role of accessible, accurate and adequate corporate information in preventing and detecting illicit financial activities.[12] Furthermore, it is clear that authorities require the mandate, incentives and resources necessary to collect, check and challenge that information in the first place. For their part, enforcement bodies need to be empowered and resourced to proactively pursue complex and high-level international money laundering and corruption that makes use of Irish financial vehicles and structures – which will inevitably entail lengthy and costly multi-jurisdictional investigations.

These changes are unlikely without the political will to take illicit finance threats far more seriously.[13] In the IMF's 2022 assessment referred to above, the Fund's top recommendations for Ireland were not only to enhance understanding of transnational risks but also to reprioritise national policy and institutions towards 'tackling ML/TF risks related to cross border and non-resident activity'.[14] Whilst there have certainly been some positive steps in this direction, policymakers are yet to demonstrate the significant shift required in terms of understanding and reprioritisation to adequately address these risks. In highlighting specific gaps and weak links in the legislative framework, this report aims to contribute to that change; acting as a catalyst for the reforms necessary to protect Ireland from being used for transnational illicit financial flows.

BENEFICIAL OWNERSHIP TRANSPARENCY

A CORPORATE LAWYER'S PERSPECTIVE

Paul Egan SC*

1. INTRODUCTION: WHY KNOWLEDGE OF BENEFICIAL OWNERS IS IMPORTANT

The issue of beneficial ownership of companies and its concealment and disclosure have increasingly made it into mainstream news and been widely discussed online in recent years.[15] Investigative journalism has uncovered the many innovative and Byzantine methods of concealment of ownership and control of companies. This in turn has highlighted the importance of disclosure of beneficial ownership. The not-for-profit organisation Open Ownership puts it in these terms:

'If the beneficial owners are hidden, then governments don't know who is bidding for a contract, companies don't know who they are doing business with, society doesn't know who is financing a new political party, and law enforcement can't fight money laundering and other cross-border financial crimes.'[16]

We can add that concealment of beneficial ownership means concealing the owners and controllers of companies seeking permission for property developments. It means that the identity of those profiting from companies polluting the environment, selling unsafe products or acting as fronts for sanctioned individuals or companies are concealed from the public. It means concealment of those behind stake-building in and takeovers of companies. In summary, it enables those with significant economic power to conceal that power.

2. COMPANY LAW

This is not a new issue. It is for several of these reasons that the law in Ireland and the UK has, for over 180 years, mandated the public availability of information on those who own and control registered companies. Company law has required companies to keep registers of members (i.e. shareholders) and registers of directors accessible to the public, and periodic and event-driven filings with the Registrar of Companies, again accessible to the public. Section 18 of the Joint Stock Companies Act 1844 provided that 'every Person shall be at liberty to inspect the Returns, Deeds, Registers, and Indexes which shall be made to or kept by the said Registrar of Joint Stock Companies'. This provision has been re-enacted in Ireland and the UK several times and is found in both countries' Companies Acts.[17]

There was of course a lacuna in this company law. An individual could be named as a director but that individual could be a nominee of an undisclosed third party pulling the strings. An individual could be identified as a shareholder but holding the shares as trustee for an unnamed beneficial owner.

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Laws enacted in 1967 in the UK[18] and in 1990 in Ireland[19] now required the interests in the shares and debt securities of a company by a director of the company, along with those of their families, and companies controlled by them, to be kept in a company register, accessible by the public. A person 'acting in accordance with whose directions or instructions the directors of a company are accustomed to act' – a shadow director – was deemed to be a director of the company for the purposes of this disclosure requirement.[20] To this were added laws enacted in 1981 in the UK and in 1990 in Ireland, requiring disclosure of interests of any person in stakes in the voting shares of public limited companies.[21]

It is fair to say that the effect of this law, when allied with the disclosure obligations connected with the filing by companies of their financial statements, was to enable a reasonable, if incomplete, picture of company ownership to be constructed. An important message from these laws was that disclosure of ownership and control information – registered shareholders and directors – was an integral part of company law. It was accepted that disclosure of this key information was central to a social bargain: the state would grant corporate status, usually with limited liability, in return for the disclosure to the public of who owns and controls that corporate entity.[22] It was accepted, to use a phrase that would arise later, that society had a 'legitimate interest' in knowing this information.

3. EU COMPANY AND ANTI-MONEY LAUNDERING LAW

Although, as we shall see, EU law and rulings of the Court of Justice of the EU (CJEU) have significantly eroded public accessibility to beneficial ownership information, EU company law mandates the disclosure of certain key information concerning limited companies:

- The identity of the member of a single-member private limited company;[23]
- The identity of the directors of a limited company;[24]
- The identity and signature of the branch representative of a foreign limited company;[25]
- The identity of those with a 5% or more interest in the voting shares of a company admitted to trading on a regulated market.[26]

The EU began adopting a series of measures with the aim of combating money laundering in 1991, with the first Directive targeting money in the financial system derived from narcotics trafficking.[27] A second Directive in 2001[28] extended the scope of financial institutions covered and a third Directive in 2005[29] extended the scope of the previous measures to terrorist financing. It was the fourth Directive in 2015[30] which introduced the requirement for maintenance by all companies of a register of beneficial ownership. The Directive's reasoning is stated in its recitals:

'There is a need to identify any natural person who exercises ownership or control over a legal entity. …'[31]

'The need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise hide their identity behind a corporate structure. Member States should therefore ensure that entities incorporated within their territory in accordance with national law obtain and hold adequate, accurate and current information on their beneficial ownership, in addition to basic information such as the company name and address and proof of incorporation and legal ownership. … Member States should ensure that beneficial ownership information is stored in a central register located outside the company, in full compliance with Union law.'[32]

For the purpose of this Directive, a 'beneficial owner' is an individual who ultimately controls an entity, and includes an individual owing or controlling more than 25% of the shares of a company, directly or indirectly.[33] It requires 'corporate and other legal entities … to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held'.[34] Member States must ensure that this beneficial ownership information is held in a central register, for example the Member State's register of companies.[35]

The 2015 Directive restricted access to the central register to:

'(a) competent authorities and FIUs,[36] without any restriction;

(b) obliged entities,[37] within the framework of customer due diligence …

(c) any person or organization that can demonstrate a legitimate interest.'[38]

The information to be available to those with a 'legitimate interest' was 'at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner, as well as nature and extent of beneficial interest held.'[39]

The provisions of the 2015 Directive were amended by the fifth Directive in 2018,[40] broadening access from those with a 'legitimate interest' to 'any member of the general public'.[41] The reasoning for this is set out in the Directive's recitals:

'(30) Public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system. It can contribute to combating the misuse of corporate and other legal entities and legal arrangements for the purposes of money laundering or terrorist financing, both by helping investigations and through reputational effects, given that anyone who could enter into transactions is aware of the identity of the beneficial owners. It also facilitates the timely and efficient availability of information for financial institutions as well as authorities, including authorities of third countries, involved in combating such offences. The access to that information would also help investigations on money laundering, associated predicate offences and terrorist financing.

(31) … [C]ontrolling beneficial owners with large voting blocks may have incentives to divert corporate assets and opportunities for personal gain at the expense of minority investors. The potential increase in confidence in financial markets should be regarded as a positive side effect ….

(32) Confidence in financial markets from investors and the general public depends in large part on the existence of an accurate disclosure regime that provides transparency in the beneficial ownership and control structures of corporate and other legal entities as well as certain types of trusts and similar legal arrangements. …'[42]

The information to be available, now to any member of the general public, was again 'at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner, as well as nature and extent of beneficial interest held'.[43] In addition, Member States were authorised to provide for access to additional information enabling the identification of the beneficial owner, including 'at least the date of birth or contact details in accordance with data protection rules'. The words 'at least' in these provisions were to become relevant.

Disclosure of this key information was central to a social bargain: the state would grant corporate status, usually with limited liability, in return for the disclosure to the public of who owns and controls that corporate entity. It was accepted, to use a phrase that would arise later, that society had a 'legitimate interest' in knowing this information.

> The Irish amendment purported to give effect to this aside, but it did so in such a way that, in order for a journalist or civil society organisation to gain access, they must in practice prove to the Registrar that they already know the information that they are seeking.

4. SOVIM AND THE SHY MR W.M.

The 2018 amendment was to be short-lived. Two unrelated cases against the Luxembourg Business Registers came before the CJEU, one brought by a Court-anonymised Mr 'W.M.' and another by a company, Sovim SA, each relating to the issue of public access to beneficial ownership in central registers.[44] The key argument made by each plaintiff was that disclosure of information concerning the beneficial owner would be a serious interference with the beneficial owners' fundamental rights under Articles 7 and 8 of the EU's Charter of Fundamental Rights.[45] Article 7 provides that '[e]veryone has the right to respect for his or her private and family life, home and communications.' Article 8 provides that '[e]veryone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'.

In his opinion, the Advocate General concluded that the making available and disclosure to the public via a register of beneficial ownership, and the public's access to that data, constituted interferences with the fundamental rights guaranteed by Articles 7 and 8.[46] However, given the relatively restricted scope of the personal data subject to such interference and the fact that the data was not especially sensitive, the potential harm for individuals affected by such interference might be regarded as moderate. The interference was not, in his view, particularly serious, since data of that scope and nature did not of itself enable precise information about the person concerned to be obtained and therefore does not directly and seriously affect the intimacy of their private life.[47]

However, the problematic words were 'at least'. The power of Member States to expand the information available to the public beyond the name, the month and year of birth and the country of residence and nationality of the beneficial owner, and the nature and extent of beneficial interest held, would or might entail a serious interference with those fundamental rights. Accordingly, on that ground, he advised the CJEU to rule as invalid the 2018 creation of public access to the register of beneficial ownership.[48]

The CJEU however went further and disagreed with the Advocate General's conclusion as to the nature of the interference with the Charter's fundamental rights, ruling that it was serious.[49] The principle of transparency could not be considered an objective of general interest capable of justifying this interference with those fundamental rights, which would result from the general public's access to beneficial ownership information.[50] The CJEU ruled that the 2018 amendment providing for access to the general public was invalid, thereby restoring the 2015 fourth Directive text as originally enacted, limiting access to beneficial ownership information to those with a 'legitimate interest'.[51]

5. CRITICISM OF THE CJEU DECISION

Criticism of this ruling was swift and to the point. Transparency International stated:

'Access to beneficial ownership data is vital to identifying – and stopping – corruption and dirty money. The more people who are able to access such information, the more opportunity to connect the dots. We have seen time and time again … how public access to registers helps uncover shady dealings. At a time when the need to track down dirty money is so plainly apparent, the court's decision takes us back years.'[52]

It immediately emerged on investigative websites that the shy 'W.M.', who had wished to conceal their beneficial ownership in the company in question, appeared to be a rather public individual – indeed, a chief executive of a large company, with dozens of directorships, a comprehensive professional biography online, and a healthy and active social media presence with thousands of followers. The personal data that they sought to conceal from the public – with the exception of their ownership interest in that unnamed company – was already public information.[53]

It is submitted that this highlights how the CJEU misdirected itself: it confused the trigger for disclosure of information and the substance of personal information disclosed. It is accepted that one's privacy might be affected by the publication of certain information, such as one's home address or home telephone number. However, the Court appears to have elevated the secret ownership of a significant stake in a company to the status of a fundamental right, rather than focusing on the information disclosed, triggered by that ownership. In a previous ruling of the CJEU,[54] the disclosure of the fact of an individual having been a director of a company was held not to be an unjustifiable interference with that individual's fundamental rights. The Court was able to distinguish between the trigger for disclosure – having been a director – and the nature of the information disclosed.

6. CONSEQUENCES FOR THE UK AND IRELAND

By the time of the CJEU Sovim / W.M. ruling, the UK had left the EU. Although the EU law in force at the time of the UK's leaving the EU had largely continued in force, one notable exception was the EU's Charter of Fundamental Rights, which has left the UK unfettered in its approach to disclosure of beneficial ownership. In 2016, the requirement to keep a register of 'persons with significant control' of a company – the UK equivalent of the EU Directives' 'beneficial owner' – was added to and seamlessly integrated into the UK Companies Act.[55] It remains there unaltered by the CJEU ruling, and was subsequently reinforced by 2023 legislation[56] such that, if conducting an online search on the UK's Companies House website, the identity of persons with significant control is as freely available as the identity of company directors.

Ireland on the other hand took a different course of action following the CJEU ruling. First, the Register of Beneficial Ownership was closed down immediately. Then, six months later, an amendment was made to the Irish transposition of the EU Directives,[57] which, unlike in the UK, are enacted separately from company law. The CJEU ruling had contained the aside that press and civil society organisations connected with the prevention and combating of money laundering and terrorist financing would have a legitimate interest in accessing information on beneficial ownership. The Irish amendment purported to give effect to this aside, but it did so in such a way that, in order for a journalist or civil society organisation to gain access, they must in practice prove to the Registrar that they already know the information that they are seeking. It is understood that no journalist has yet succeeded in accessing beneficial ownership information using the amendment.

7. THE EU SIXTH AML DIRECTIVE AND REGULATION

In May 2024, the EU adopted a Directive[58] and Regulation[59] which update the law and replace the 2015 and 2018 Directives' provisions as to public access to beneficial ownership information. These measures will come into effect in July 2027. The new regime copper-fastens the CJEU ruling in two ways. First, the Directive specifies the information to be available, and does not empower Member States to disclose additional information. The information is limited to:

'(a) the name of the beneficial owner;

(b) the month and year of birth of the beneficial owner;

(c) the country of residence and nationality or nationalities of the beneficial owner;

(d) for beneficial owners of legal entities, the nature and extent of the beneficial interest held;

(e) for beneficial owners of express trusts or similar legal arrangements, the nature of the beneficial interest.'[60]

Secondly, it limits access beyond obliged entities, state authorities and similar bodies to three categories of persons with a 'legitimate interest'. In each case, the legitimate interest is couched in the context only of preventing or combating 'money laundering, its predicate offences or terrorist financing':

(a) persons acting for the purpose of journalism, reporting or any other form of expression in the media, that are connected with the prevention or combating of money laundering, its predicate offences or terrorist financing;

(b) civil society organisations, including non-governmental organisations and academia, that are connected with the prevention or combating of money laundering, its predicate offences or terrorist financing;

(c) natural or legal persons likely to enter into a transaction with a legal entity or legal arrangement and who wish to prevent any link between such a transaction and money laundering, its predicate offences or terrorist financing".[61]

Central registers must keep records of those accessing beneficial ownership information so that the beneficial owners can exercise their rights under the GDPR to identify those who have accessed their personal information.[62] There is an exception for journalists and organisations at points (a) and (b), but not persons described at (c).

8. CONCLUSION

The EU law that has emerged in the wake of the CJEU ruling in W.M. / Sovim is, to understate the case, imperfect. Knowledge of those who own and control companies is a legitimate interest of every EU citizen. The EU law limits access to public authorities and elites. Whilst beneficial ownership information may be made available to journalists and civic society organisations, are they constrained in their use and publication of it?

It is submitted that it is absurd for this law to be a creature only of the fight against terrorist financing and money laundering. It should not be in a separate legal silo; it should be integrated fully into company law. There are gaping holes in the 2024 regime: how, for example, is a journalist to discover that a company is or is not a front for persons subject to the EU's extensive suite of restrictive measures such as those in place affecting those complicit in the invasion of Ukraine? How can a journalist ascertain the owners of a company that may be responsible for environmental contamination and consequent public health issues?

It is obvious that the path that the UK has taken is the way forward. In 1844, the Joint Stock Companies Act initiated a culture of disclosure of ownership and control, which continues to the present day. There are too many reasons why those who own and control companies should be known to the public, and the limp EU measures and their likely Irish manifestation in due course only serve the purposes and objectives of bad actors beyond money launderers and terrorists. There is no good reason to separate disclosure of beneficial ownership from disclosure of directors, disclosure of registered shareholders, disclosure of financial statements, and disclosures of other relevant company information: it should be a routine element of the disclosure obligations of company law.

Paul Egan SC is a solicitor admitted in Ireland and in England and Wales, of counsel with Mason Hayes & Curran LLP, Dublin and London.

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IRISH LIMITED PARTNERSHIPS

THE PRESSING CASE FOR EXTENSIVE REFORM

Elspeth Berry*

1. INTRODUCTION: HOW LIMITED PARTNERSHIPS ARE USED TO MOVE AND LAUNDER ILLICIT FUNDS

In recent years,limited partnerships (LPs) are alleged to have been used for criminal activities on an industrial and international scale,[63] including money laundering,[64] bribery and corruption,[65] tax evasion,[66] digital bootlegging,[67] child pornography[68] and drug and arms trafficking.[69] The abuses were initially exposed in Scotland but appear to have spread to the rest of the UK,[70] and similar concerns have also arisen in the US.[71] Abuses of Irish LPs have also been revealed, including in the leaked Pandora Papers which exposed international financial secrets.[72] The Department of Enterprise, Trade and Employment (DETE) promised to reform LPs as early as 2019,[73] and although it has now published the draft Registration of Limited Partnerships and Business Names Bill 2024 ('the draft Bill'),[74] the delay may have contributed to the spread of criminality and wrongdoing to Ireland. Furthermore, as this chapter will demonstrate, the Bill omits many of the reforms necessary to combat this behaviour.

The reasons for the abuses lie in a combination of the LP's legal features (discussed in Section 3) and government policy. Its legal features produce an apparently legitimate business vehicle which is almost entirely secret and which has largely passed under the legislative radar. Meanwhile, government policy often prioritises the interests of the financial services industry,[75] including international investors, over those of ordinary businesses and the general public. As Dáil Deputy Ruairí Ó Murchú noted, financial services is 'one industry with its own needs and interests … [which] are not shared by the majority of [Irish] constituents'.[76] Ireland has two types of LP – an ordinary LP and an Investment LP (ILP) – but the prioritisation of financial services meant that DETE's 2019 consultation on LP reforms initially resulted in reforms only to ILPs. Indeed, the Irish Government's own national money laundering risk assessment confidently asserted that the mere act of LP registration and associated disclosure requirements (despite the minimal details registered) minimised the risks.[77] Yet Ireland's growth as an international financial centre increases both the scale and the complexity of those risks.[78]

The abuses should concern both government and civil society, because of the impact of dirty money[79] on the property market, political influence and national security,[80] the diversion or non-payment of tax, and the impact of criminal activities such as terrorist financing[81] and drug trafficking on the streets of Ireland. As the International Monetary Fund (IMF) has warned, 'Ireland faces significant and increasing threats from foreign criminal proceeds'.[82] And the worst may be yet to come – the initial apparent migration of wrongdoing from UK to Irish LPs[83] occurred in response to a single, relatively limited UK measure – the introduction of a requirement for Scottish LPs to disclose their true owners.

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After that, the Companies Registration Office (CRO) reported that the number of (Irish) LPs being registered was 'abnormally high'[84] and Dáil Deputy Ged Nash noted 'a trebling' of registrations.[85] But now, the UK's Economic Crime and Corporate Transparency Act 2023 (ECCTA)[86] is introducing a much more substantial range of restrictions on UK LPs, and the likely impact is a further migration of criminality to Irish LPs.

2. OVERVIEW OF GLOBAL LEGAL AND REGULATORY FRAMEWORKS

LP vehicles exist across the world, but LP regulation is carried out almost exclusively by national authorities, and thus countries such as Ireland engage in regulatory competition to make their version of the LP vehicle the most attractive to investors.[87] Other notable jurisdictions in terms of the international popularity of their LPs include Scotland, England and Wales, Northern Ireland, the UK's Overseas Territories (for example, Gibraltar), Crown Dependencies (Jersey, Guernsey and the Isle of Man), Luxembourg,[88] and the USA. Typical LP features include formation on registration at the companies registry, the requirement of at least one general partner, who manages the business and has personal liability for its debts, and at least one limited partner, who provides the capital and has no further personal liability so long as they do not engage in management.

Many of the features of Irish LPs discussed in Section 3 of this Chapter are common to other LP vehicles. However, there are a number of variations, for example:

1) Some jurisdictions, such as Scotland[89] and the US,[90] give LPs separate legal personality to their partners. Others, such as Luxembourg,[91] Jersey,[92] Guernsey[93] and Gibraltar,[94] provide it as an option. But in others, such as Ireland, England and Wales, and Northern Ireland, LPs do not have separate legal personality. Separate personality can enable the LP to enter into contracts and own property directly, and can enable continuity because the LP continues to exist when a partner leaves or a new partner joins. It is therefore normally seen as an advantage – hence the extensive abuses initially focussing on Scottish LPs, which have separate personality whereas those in the rest of the UK and Ireland do not. However, the benefits it enables can be achieved in other ways, and LPs which are legal persons may be required to pay tax in some jurisdictions.

2) Some jurisdictions provide a 'safe harbour' list of activities, which clarifies what limited partners may do without losing their limited liability – for example, Jersey,[95] Guernsey,[96] Gibraltar,[97] and the UK but only for Private Fund LPs (PFLPs),[98] which are a subset of LPs available only to investment businesses. The problem with this is that, as explained in Section 3, loss of limited liability occurs by law if a limited partner engages in management – yet many of the activities listed are in reality management. For example, in Jersey this includes exercising a veto over decisions, or acting as a member of an LP board or committee;[99] and, in the UK PFLP legislation, taking part in a decision to incur LP debt,[100] dispose of the LP's business or acquire another business.[101] This is despite UK courts previously holding that scrutinising and commenting on business decisions constituted management.[102]

3) Public disclosure requirements vary, although they generally omit any requirement for public filing of accounts. Some require the disclosure of the ultimate beneficial owners of the firm, if these are different to the partners, but most do not. Disclosure is, for example, required in Gibraltar.[103] It is also required in Ireland for ILPs but not for ordinary LPs.[104] In Guernsey it is only required if the LP has opted for separate personality,[105] and in the UK it is not required at all. In Jersey[106] and Guernsey,[107] even the names of the limited partners are not disclosed.

4) Restrictions on capital repayment to limited partners, which protect creditors if the firm subsequently becomes insolvent, vary considerably. For example, limited partners are not liable to repay withdrawn capital in Luxembourg,[108] in UK PFLPs[109] or, subject to certain conditions, in Irish ILPs.[110] Those in Jersey[111] and Guernsey[112] are only liable to return capital if the LP becomes insolvent within six months of the withdrawal,[113] and those in ordinary Irish and UK LPs remain liable indefinitely.[114]

5) Several jurisdictions have a special – usually less – regulated version of the LP vehicle for the financial services industry. Examples include UK PFLPs, Irish ILPs, and Gibraltar Protected Cell LPs.[115]

Internationally, the EU has enacted (and Ireland has implemented) one Directive specifically aimed at EU partnerships, which requires their accounts to be disclosed publicly if all the general partners are limited companies and have thus effectively limited their liability for partnership debts.[116]

Ordinary LPs, unlike companies (or ILPs), are not required to disclose their 'beneficial owners' – in other words the people who actually control, and benefit from, the LP's business. This allows them to avoid scrutiny by creditors, regulators or enforcement agencies, so they cannot be held accountable for wrongdoing.

The EU has also enacted several anti-money laundering (AML) Directives which apply to all EU firms, including LPs. These impose requirements such as disclosure of beneficial ownership and the criminalisation of money laundering. Ireland has implemented these through the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, as amended.[117] However, although that Act defines a beneficial owner in relation to a partnership,[118] and ILPs are required to disclose their beneficial owners,[119] there is no parallel requirement for ordinary LPs.

The IMF[120] and the Financial Action Task Force (FATF)[121] make country reports, and FATF makes recommendations on combatting money laundering and terrorist financing facilitated by businesses vehicles. This includes a recommendation to ensure the disclosure of the beneficial ownership of businesses and the accuracy and accessibility of this information.[122] However, these recommendations have no binding legal force.

3. KEY FEATURES OF IRELAND'S LEGAL AND REGULATORY FRAMEWORK

Ordinary LPs are governed by the Limited Partnerships Act 1907. This legislation was enacted before Irish independence and has been retained by successive Irish governments. It is only with the reforms made by the UK's ECCTA 2023 that the 1907 Act began to look very different in the two countries. Key legal features of an ordinary LP include:

- An LP is formed of two or more persons carrying on business with a view of profit, at least one of whom must be a general partner and one a limited partner.[123]
- General partners have the right to manage the partnership and in principle have unlimited personal liability for the debts of the LP, but can circumvent this if they are a corporate body rather than an individual.[124]
- Limited partners are required to make a capital contribution,[125] but there is no minimum and it could be as little as one euro. They are prohibited from taking part in management of the LP in return for their liability being limited to their capital contribution.[126]
- LPs are prohibited from having more than 20 partners,[127] subject to specific exceptions for certain professions, including providers of investment services to businesses.[128]
- An LP is formed by registration at the CRO,[129] but very little information about LPs is required to be publicly disclosed – not their accounts (except in the limited circumstances in which the EU Directive discussed in Section 2 applies), nor their constitutional arrangements, and not even their true owners or controllers if these are not the partners (for example the majority shareholder of a corporate general partner).
- An LP's proposed principal place of business on first registration must be in Ireland, but this need not be maintained thereafter.[130]
- Despite this, on registration an LP obtains a certificate of registration[131] and, with it, a veneer of international and legal respectability.
- The 1907 Act contains only minimal rules for how the LP is run, and these can be overridden by contrary agreement of the partners. Any such agreement is private.

- An LP is 'tax transparent' – the LP itself pays no tax and its profits are only taxed through income or corporation tax on its partners.[132] This makes it attractive both to legitimate investors and wrongdoers, because it means that overseas partners are not taxed in Ireland at all, and can often avoid tax in their home jurisdictions.

ILPs are governed by the Investment Partnerships Act 1994. They have only a few similarities to ordinary LPs:

- An ILP is formed of two or more persons,[133] at least one of whom must be a general partner and one a limited partner.[134]
- A limited partner's liability is limited to their capital contribution, unless they take part in management.[135]
- They are tax transparent.[136]

The differences are much more striking:

- An ILP's business must be the investment of the LP's funds in property.[137]
- An ILP must be authorised by, and registered with, the Central Bank of Ireland.[138] ILPs are not registered at the CRO.
- It must have a depositary (an authorised investment firm or credit institution) to safeguard assets, and any change of depositary must be approved by the Central Bank.[139]
- It must have a partnership agreement, and changes to it must be authorised by the Central Bank.[140]
- At least one general partner must be either authorised as a fund manager by the Central Bank, or satisfy the Central Bank as to their competence and probity.[141]
- The Central Bank can apply to the court to appoint inspectors to investigate and report on the affairs of the ILP,[142] and can direct that the ILP be wound up.[143]
- An ILP must file an annual report with the Central Bank, including audited accounts.[144]
- The principal place of business and registered office must be in Ireland.[145]
- An ILP must disclose details of its beneficial owners.[146]
- Limited partners in an ILP benefit from a safe harbour list.[147]

4. PROBLEMS WITH THE CURRENT LEGAL REGULATION OF LPS

The current legal regulation of LPs in Ireland gives rise to a number of problems.

1) Ordinary LPs, unlike companies (or ILPs), are not required to disclose their 'beneficial owners' – in other words the people who actually control, and benefit from, the LP's business.[148] This allows them to avoid scrutiny by creditors, regulators or enforcement agencies, so they cannot be held accountable for wrongdoing by the LP. As mentioned in Section 2, this need not be the case – not only are LPs in some other jurisdictions, such as Gibraltar, required to disclose their beneficial owners but Ireland itself requires ILPs to do so. However, even where disclosure is required, the thresholds triggering disclosure are generous and very little enforcement appears to take place, as a Transparency International (TI) investigation into Luxembourg LPs has shown.[149]

2) There are no restrictions on the use of corporate partners, in sharp contrast to the ban on corporate directors.[150] The use of corporate rather than human partners facilitates secrecy, lack of accountability and impunity, because it hampers creditors, regulators and enforcement bodies from following the chain of ownership and control to a real person. It also enables *de facto* limited liability for general partners. The use of corporate partners is therefore often associated with wrongdoing.[151]

3) There is no limit on the number of partner appointments that a person can hold, again in sharp contrast to companies where there is a limit of 25 directorships.[152] Yet multiple appointments are often indicators of wrongdoing,[153] as the Irish government itself has acknowledged.[154] It is also unlikely that general partners who act for dozens or hundreds of LPs can fulfil their legal duties.

4) There is no requirement that any partners must be resident in, or have any connection with, Ireland. Indeed, partners are not subject even to the minimal requirement applicable to companies, which must have at least one director who is resident in an EEA state[155] unless the company holds a bond of €25,000 or the Registrar has certified that the company has a 'real and continuous link with one or more economic activities that are being carried on' in Ireland,[156] and must state the place(s) in Ireland where they will carry on their activity.[157]

Irish LPs are promoted internationally – including in Russia – as a cheap, secret and tax-free business model associated with a country with a reputation for probity and the rule of law, and with access to EU markets.[158] The Pandora Papers showed that significant numbers of Irish LPs' partners are based in offshore jurisdictions, often secrecy jurisdictions.[159] This puts those operating Irish LPs beyond the reach of regulators, enforcement agencies and creditors, and increases the secrecy and opacity of the LP's structure. This is especially so when, as is usually the case, the overseas partners are also corporate entities.[160] The use of partners based in secrecy jurisdictions has been identified as a risk factor by the IMF.[161]

This also means that the LP is unlikely to provide an economic benefit to Ireland. At the extreme end of this practice are the 'phantom' or 'postbox' LPs that provide a fictitious Irish address, which can result in the innocent residents of that address receiving intimidating demands for payment and a damaged credit rating.[162]

5) Trust and company service providers (TCSPs) can have a key role in forming or operating wrongdoing LPs, yet TCSPs accounted for only 15 out of 52,222 Suspicious Transaction Reports (STRs) submitted to the Irish Financial Intelligence Unit (FIU) in 2023.[163] Indeed, some of the same TCSPs are involved in multiple LP formations[164] in both Ireland and the UK, but the minimal registration requirements for LPs make it easy for TCSPs to form multiple LPs on the same day.[165]

The root of the problem is that although TCSPs have extensive power to market, form and operate LPs, they are not properly regulated.[166] TCSPs in the financial sector are regulated by the Central Bank, in the legal and accountancy sectors by their professional bodies, and otherwise by the Department of Justice (DoJ). However, that supervision is clearly inadequate to prevent abuses. It closely mirrors the failings of the UK system, with a multiplicity of regulators operating inconsistent systems and without sufficient expertise or funding to do the job.[167]

Indeed, the default regulator in Ireland (the DoJ) charges TCSPs significantly less than its UK counterpart (HM Revenue and Customs) – €130 total charge in Ireland compared to £300 in the UK for each of the TCSP's premises plus £150 for each staff member. FATF,[168] the United Nations Office on Drugs and Crime (UNODC)[169] and TI Ireland have all raised concerns about the ability of the DoJ and the professional bodies to assess risk and take enforcement action. Both UNODC[170] and TI Ireland[171] have recommended a single, unified AML regulator for non-financial services TCSPs.

6) There is no power to investigate ordinary LPs, in sharp contrast to the power to investigate ILPs[172] or companies.[173]

7) There is no power to compulsorily dissolve an ordinary LP which has been used in wrongdoing.

8) The Registrar of Companies has no power to query suspicious or deficient filings for ordinary LPs, and ILPs are not registered at the CRO at all. This means that the register may be incomplete and unreliable. It also increases the risk of wrongdoing as it reduces transparency for those doing business with the LP, as well as for investigators and enforcement agencies.

9) Little information about LPs is publicly disclosed. The CRO levies a fee for access to any information beyond an ordinary LP's name, address and registered number (and beyond that it only holds information on the partner names, the limited partners' capital contributions, and the nature of the business).[174] The Central Bank discloses, at most, only the ILP's name and address, and those of its fund manager and depositary. Both of the latter are invariably corporate bodies, often overseas. This lack of transparency hampers regulators, enforcement agencies, creditors or members of civil society, including journalists, in investigating LPs or holding them to account.

10) Some of the actions in the safe harbour list for ILPs effectively allow limited partners to engage in management and yet retain their limited liability. This transfers the financial risk from them to innocent third-party creditors. Such actions include: being a director or shareholder of a corporate partner, and thus potentially able to control that general partner;[175] and voting on the transfer of ILP assets,[176] the incurring of debts,[177] or changing the ILP's objectives or policies.[178]

5. CONCLUSION AND RECOMMENDATIONS

In the light of the significant problems discussed above, the draft Bill therefore needs to include the following provisions:

Mandatory transparency of the real owners and controllers. The effectiveness of a requirement to disclose ultimate owners in combatting wrongdoing can be seen in the significant reduction in the number of Scottish LPs being registered after they were forced to disclose those owners.[179]

Of course, all businesses must be owned and controlled by someone if they are to exist at all, and the Irish Government has accepted this logic by requiring ILPs to disclose their beneficial owners.[180] Unfortunately, however, it has not applied this requirement to ordinary LPs. The draft Bill would require ordinary LPs to keep records of the beneficial owners of corporate partners, but only non-EEA partners, and the register will not be publicly disclosed.[181] The Regulatory Impact Analysis (RIA) for the Bill asserts that beneficial owners of EEA partners are 'ascertainable',[182] but companies often fail to register accurate information.[183] In any event, finding this information on an overseas register creates an additional obstacle for Irish regulators and enforcement agencies, as well as for creditors, journalists and civil society organisations. Even if the partner is an Irish company, public access to Ireland's Register of Beneficial Ownership is now restricted following a ruling of the EU Court of Justice.[184]

Curbs on corporate general partners. Ideally these would be prohibited but, failing that, there should be a requirement for at least one individual general partner. Unfortunately, the Bill makes no such requirement, and indeed extends the current statement in the 1907 Act that a body corporate may be a limited partner, to provide that it may be a general or a limited partner.[185]

Curbs on offshore general partners. Ideally these would also be prohibited but, failing that, general partners based in secrecy jurisdictions (i.e. those who are not subject to rigorous transparency requirements, including disclosure of beneficial owners of corporate bodies) should be prohibited. The Bill makes no such requirement.

Finding this information on an overseas register creates an additional obstacle for Irish regulators and enforcement agencies, as well as for creditors, journalists and civil society organisations. Even if the partner is an Irish company, public access to Ireland's Register of Beneficial Ownership is now restricted following a ruling of the EU Court of Justice.

Requirement of a real connection with Ireland. This is already the case for ILPs, which must have their principal place of business in Ireland (see Section 3).

The draft Bill contains the potentially helpful provision that an LP will not be registered 'unless it appears to the Registrar that the [LP], when registered, will carry on an activity in the State'.[186] Although this replicates a company law provision, it is not clear what counts as an 'activity', or how substantive or economically valuable it must be. It is also unclear how the Registrar will assess this, and how rigorously. Furthermore, this requirement is not matched by any proposal for the new annual confirmation statement to confirm, let alone demonstrate, a continuing activity in Ireland.[187]

The Bill requires an LP to have an 'appropriate' registered office or principal place of business in Ireland,[188] but this would not guarantee that 'the LP will carry on an economic activity … in the State',[189] contrary to DETE's assertion to this effect. The definition of 'appropriate' can be fulfilled if the LP merely has a registered office in Ireland (whereas an ILP must also have a principal place of business there),[190] or just a general partner's address there, or even just that of a TCSP acting for the LP. Although these options should combat the 'postbox' LPs discussed in Section 3, none guarantee a substantive economic link to Ireland.

The Bill also requires at least one general partner to be resident in, or have its registered office in, an EEA State.[191] However, while this makes the general partner marginally easier to trace than if they are based in a secrecy jurisdiction outside the EEA, it provides no guarantee of an economic benefit or genuine connection to Ireland.

Improved regulation of TCSPs. An independent body is needed to review TCSPs to ensure that they:

- Are registered with an AML supervisor at the time of filing any documentation at the CRO;
- Have policies/processes sufficient to assess and manage ML risks posed by clients;
- Keep records and perform due diligence;
- Report suspicious activity by clients.

The draft Bill requires a TCSP acting on behalf of an LP to provide its business address and evidence of registration with an AML supervisor.[192] The RIA for the Bill asserts that the address alone 'ensur[es] compliance with relevant [AML] provisions',[193] which is patently not the case, but even evidence of registration with an AML supervisor provides insufficient guarantees, given that supervision is often inadequate.

Introduce a power to investigate suspicious LPs. This should be equivalent to the existing powers to investigate companies and ILPs. The Bill makes no such provision.

Introduce a power for the CRO to compulsorily dissolve a wrongdoing (or simply inactive) LP. This should be equivalent to what is effectively the case for ILPs, and could be modelled on what ECCTA 2023 has done for LPs in the UK, which is to allow winding-up in the public interest.[194] The draft Bill would permit the Registrar to remove LPs from the Registrar – but only for defaults in registration or upon an event which makes it unlawful to carry on the business in partnership.[195] The latter would not apply merely because the LP engages in wrongdoing; only where the substantive business is unlawful[196] or the LP was formed illegally.[197]

Improve the reliability of the public register. This should be both through robust identity verification of partners prior to registration of the LP, and through enabling the Registrar to challenge the veracity of registered information. The draft Bill proposes increased powers (but not duties) for the Registrar to check information,[198] though meaningful exercise of even these limited powers would require a substantial increase in Ireland's exceptionally low registration fees (€2.50 compared to an EU average of €300).

Restrict the 'safe harbour' list for ILPs to activities which genuinely do not involve management. 'Safe harbour' should not be provided for actions which effectively amount to management of an ILP, and the Investment Limited Partnerships Act should be amended accordingly.

Improve the transparency of ILPs, as well as LPs. Information about ILPs should also be registered with, and publicly available at, the CRO. There is a perhaps surprising precedent for such disclosure; the UK equivalent of ILPs, PFLPs, are registered at Companies House and their details are available on the public register.

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FRAUDULENT COMPANY REGISTRATIONS

AND THE STATE'S RESPONSE

John Mulligan*

1. INTRODUCTION

Ireland has long boasted to the international community about the ease of doing business here, including the speed at which companies can get started; new firms can be registered and active within a matter of days. But the ease with which this can be done has also proved to be a dangerous weakness.

A long-running investigation by the Irish Independent in 2021 that uncovered hundreds of suspicious companies established at the Companies Registration Office (CRO) underscored and exposed the weaknesses of the company registration process in Ireland.[199] It tarnished the notion that the official company register in Ireland provided a transparent and trustworthy source of information that could be used to ascertain the veracity of firms established here. Suspicious firms identified as part of that investigation could have been used to facilitate anything from money laundering to circumventing sanctions. While Ireland might have a legal framework that ostensibly seeks to prevent and punish such malpractice, it became apparent that, at the time, the controls in place were weak and open to systematic abuse.

This paper examines how these bogus companies were formed and how loose oversight undermined laws designed to prevent abuse of the company formation process. It highlights the responses of regulatory agencies and policymakers to the probe's revelations, assesses what progress has been made in the intervening years, and concludes by recommending a continuingly proactive approach to the oversight of company registrations in Ireland.

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Those behind the companies were engaging in identity theft; they used the addresses of legitimate businesses as the registered addresses of the bogus companies... That had the potential to not only create a legal headache for the legitimate businesses whose addresses had been used, but also to entwine them in illegal activity of which they had no part or knowledge.

2. HIDING IN PLAIN SIGHT

A leafy suburban street in south Dublin is an unlikely epicentre for international crime. But it was from one house in just such a neighbourhood where, in 2021, an Irish Independent investigation identified close to 100 companies that had been established by a Chinese national over the course of just two weeks. They were easy to spot; a trawl through the weekly list of newly-formed companies published by the CRO in June 2021 yielded something unexpected. The names of some of the newly-registered firms that week were non-sensical – as if someone had simply pressed their hands onto the keyboard and whatever emerged was chosen as the name of the company. The investigation identified dozens of such firms. Even a cursory examination of filings associated with those firms immediately raised suspicions; the same residential home in south Dublin was being used for all the companies' registered addresses, and their directors included individuals with addresses in China and mainland Europe.[200]

With some specific exceptions, companies registered in Ireland must have at least one European Economic Area (EEA) resident as a director in order to avoid paying a €25,000 bond that is used, for instance, in the event of a company failing to pay fines. But it quickly became apparent that the addresses and people used to fulfil the requirement of at least one EEA-resident director had been falsified. The same names were used for a number of the 'directors' of multiple firms, but they had different addresses – in Germany and France, for instance. Even the contact emails and telephone numbers on the registration forms for the companies were inoperative. Signatures appended to much of the registration documentation had almost certainly been penned by the same hand.

Two weeks after the initial Irish Independent report, further investigation uncovered another tranche of over one hundred more questionable company registrations.[201] Again, they included directors with Chinese names and addresses. This time, those behind the companies were engaging in identity theft; they used the addresses of legitimate businesses as the registered addresses of the bogus companies. Chemists, off-licences and a home interiors retailer were among some of the businesses that unwittingly fell foul of the registration of these dubious companies. An office of the Health Service Executive and even the CRO itself were used as the registered addresses of some of the fake businesses. That had the potential to not only create a legal headache for the legitimate businesses whose addresses had been used, but also to entwine them in illegal activity of which they had no part or knowledge.

At least two individuals who provided legitimate company formation and related services found their names unknowingly being used as directors on fake companies. They wrote to the CRO in an effort to have themselves removed as directors from those firms, and one complained to the Office of the Director of Corporate Enforcement (ODCE – now the Corporate Enforcement Authority).[202]

3. RISKS AND IMPLICATIONS

The investigation highlighted a critical flaw in the Irish company registration process: the reliance on self-reported information without sufficient verification. The sheer number of fraudulent firms exposed just how easy it was for them to be registered, and how readily Ireland's lax company formation procedures could be taken advantage of. All the registrants needed to do was fill out the forms, pay the registration fee and submit the documents.

The companies that had been established using fake credentials could be used to engage in illegal activity anywhere in the world. As the former head of Kroll business intelligence and investigations, Kevin Hart, pointed out in 2021, the impact of the bogus firms that were established in Ireland could have been felt globally.[203] They could, he explained, be used to facilitate a wide range of fraudulent schemes, including trade-based money laundering, evading sanctions, tax evasion, related party transactions to create false collateral and assets used to obtain loans from banks and investors, leading to unpaid loans. KPMG also noted during the investigation that the CRO's then registration system was 'open to abuse', by 'facilitating, with relative ease, the formation of companies without adequate verification or validation processes'.[204]

4. THE OFFICIAL RESPONSE

The months following the Irish Independent's initial investigation eventually resulted in concerns being raised by politicians as to how the attempted registration of such firms was being tackled, and assurances sought that they were being investigated.

Despite being the guardian of the registration details of tens of thousands of companies in Ireland, and facilitating the weekly registration of hundreds of new firms, the CRO insisted at the time that it had no role to play in verifying crucial details of new companies, such as directors. It said that it maintained a 'good faith' register.[205] When asked for comment by the Irish Independent in 2021, a spokesperson for the Department of Enterprise, Trade and Employment (DETE), which oversees the CRO, said that 'It is not the role of the CRO to verify the details of these companies'.[206] It meant that the company registration system was open to abuse.

In November 2021, then Tánaiste Leo Varadkar – who was at the time the Minister for Enterprise, Trade and Employment – addressed the matter in the Dáil when questioned by the chair of the Oireachtas Joint Committee on Enterprise, Trade and Employment.[207] The Tánaiste claimed that the CRO response to the Irish Independent investigation had been 'robust'.[208] DETE maintained that there was no basis to believe that the bogus companies were actually fake, despite clear evidence in company filings to the contrary. The CRO insisted that the potential criminal penalties – including fines and prison sentences – for making filings containing false details were a sufficient safeguard to deter such activity. But the evidence appeared to prove otherwise.

Appearing in front of the Joint Committee on Enterprise, Trade and Employment in December 2021, representatives from the CRO and DETE admitted that they were by then aware that suspicious companies had been registered – but only after it had been brought to their attention by the newspaper reports.[209] A senior official at DETE told the committee that:

'These registers exist to provide transparency on key aspects of entities throughout their lifecycle … I wish to make an important point. The register records the details of companies, and, in itself, is an exercise in transparency so that stakeholders can inform themselves, to a certain extent, of the status of a company before they undertake dealings with it.'[210]

But the transparency the senior official alluded to was an illusion in relation to the bogus firms that had been registered. With falsified details, they could masquerade as legitimate firms, effectively certified by a State agency. Being permitted to be registered officially in Ireland, and continuing to be registered as such, would give any innocent party potentially dealing with those firms an unfounded sense of security that the companies they were dealing with were genuine, trustworthy enterprises, when in fact they were not.

As a result of the newspaper investigation, the CRO told the Oireachtas Committee that it had made eight referrals to the ODCE, with others poised, at that stage, to be reported.[211] In total, that covered 39 suspect companies already on the register and a further 47 cases where incorporation had been refused by the CRO.

A senior official with the CRO noted during the Oireachtas hearing that the CRO had just established an internal integrity checking group to try and catch rogue company filings and incorporation documents.[212] At that Oireachtas meeting in December 2021, the official also conceded that the CRO had not previously identified any registration filings for fake firms:

'It is safe to say our referral of cases involving the potential provision of false information to the register is a new development in our office and a recent one. I am almost seven years in the office and I am not aware of any referrals having been made in my time or in the period prior to that. I am not aware such cases have been referred to any parties for a number of years. However, certainly, in recent times, as of this year, we have made referrals where we have seen evidence of this.'[213]

It appears that the CRO did not refer such cases because, given that it operated a 'good faith' register, it was not looking for signs of fraudulent company registrations.

Not once since the initial Irish Independent investigation, and the raising of the matter in political circles, was the issue of bogus companies being registered in Ireland discussed during meetings of the CRO's Stakeholder Forum.

5. PANDEMIC PROLONGED THE RISKS

In the intervening years, the CRO also faced challenges as a result of the COVID pandemic. A moratorium on involuntary company strike-offs had been introduced in 2020 as part of a broader effort to ease the burden on companies dealing with the economic, administrative and logistical impact of the pandemic. The CRO initially planned to recommence strike-offs but another lock-down saw the involuntary strike-off moratorium continue.

In 2023, the CRO recommenced the process of involuntary strike-offs. A batch of almost 900 firms were involuntarily struck off in January 2024, with another 1,000 targeted for the same fate.[214] But the process was suspended the following month after 1,500 firms were found to have been erroneously struck off.[215] At the time of writing, the CRO has not yet recommenced that process. In the minutes of its June 2024 Stakeholder Forum meeting, the Office noted that 'no date for restarting' enforcement procedures were yet available and that the agency was 'still robustly testing' its systems.[216]

6. THREE YEARS LATER: CLAMPING DOWN?

Notwithstanding this, new rules are likely to help deter the type of activity that the Irish Independent investigation uncovered. From June 2023, when registering a new company, the Personal Public Service Number (PPSN) of directors must now be supplied. Those details are then cross-referenced by the CRO with the name, date of birth and PPSN held in the Department of Social Protection's database. Directors without a PPSN or a Register of Beneficial Ownership (RBO) number – such as those resident outside Ireland – must apply for an 'Identified Person Number' via a Declaration as to Verification of Identity.

These requirements were introduced under Section 35 of the Companies (Corporate Enforcement Authority) Act 2021.[217] Under that legislation, a PPSN must be submitted in respect of directors where an application is made to incorporate a company, when an annual return is submitted, or when a change of directors or secretaries is notified to the CRO. Failure to comply with this element of the new legislation can result in a fine not exceeding €5,000.

The requirement to provide a PPSN when registering a company is a strong step in the right direction in helping to eliminate the type of fraudulent company registrations that were previously evident. According to the CRO, the requirement to provide a PPSN, or equivalent, when registering a company in Ireland has 'had a positive impact in reducing the potential for fraudulent filings'.[218]

However, as of summer 2024, those companies identified in the 2021 investigation remain active on the CRO register, despite having not filed annual returns at all since 2021.[219] A DETE spokesperson said that the CRO has the power to strike-off companies for failing to file annual returns, but noted that the process has been suspended due to 'technical and administrative errors', and 'Enforcement and strike off will not recommence until the technical issue has been resolved'.[220] They added:

'The CRO has taken a number of measures internally to enhance the integrity of the register. An Integrity Group was established within the office which meets regularly to share intelligence on suspicious activity. Any suspicious activity detected is reported to the Corporate Enforcement Authority. There is a renewed focus on ensuring that Trust and Company Service Providers (TCSPs) acting on behalf of a company

are authorised by the relevant authority. Where it is found that TCSPs are not authorised, the CRO will not process any submissions filed by them and the matter is reported to the Anti Money Laundering Compliance Unit in the Department of Justice.'[221]

These are welcome steps, but steps that appear reactive rather than proactive.

Meanwhile, the Corporate Enforcement Authority (CEA) has progressed some cases against both companies and directors that have allegedly failed to comply with company law. The actions made public since 2022, when the Authority came into existence, have included tackling late filings of annual returns, failing to keep proper accounting records and providing false information. In the first 18 months of its operations – for the period to the end of 2023 - the CEA submitted 12 files to the Director of Public Prosecutions and two criminal convictions were secured in respect of failing to keep proper books of account and providing false information.[222] One of those offences related to the unauthorised and unlawful use of an Auditor Registration Number in the submission of annual returns to the CRO. The second involved a person who pleaded guilty to failing to keep proper books of account, contrary to section 202 of the Companies Act 1990.

7. OTHER JURISDICTIONS

It is instructive at this stage to briefly examine the process of company registration in other countries. In the United Kingdom, the Economic Crime and Corporate Transparency Act 2023 (ECCTA) has given Companies House (the UK's company registration agency) new powers that enable it to tackle economic crime.[223] Directors must provide identification prior to a company being registered, and a company cannot be registered until that information has been verified. Also, new directors of existing firms cannot be registered as such until their identity has been verified. The identity of a person filing documents at Companies House must also be verified.

'The ECCTA has reformed Companies House from a passive recipient of information to an active gatekeeper', noted Sophie Alexander, an Associate at law firm Sharpe Pritchard LLP.[224] She added:

'It has provided [Companies House] with more powers to query or remove information and a better ability to share information with law enforcement agencies … These new regulations aim to provide more flexibility by giving Companies House the discretion to issue a civil sanction instead of relying on criminal proceedings. The purpose of introducing this new financial penalty regime is so that the Registrar can promote compliance, as well as maintain the integrity of the UK companies register.'[225]

But the UK system is still not without its flaws. Graham Barrow, who has a long history of working at a senior level in the financial services industry, frequently uses social media to highlight continuing abuses of company registrations in the UK. In July 2024, he noted that hundreds of companies with Chinese directors had been newly registered at a retirement housing complex in Birmingham, in a continuing trend of such activity.[226]

Austria also serves as a useful example of how a stricter company formation process could serve to reduce instances of fraudulent registration.[227] There, the requirements for establishing a new company include: the provision of notarised articles of association; at least one named managing director, a notarised sample of whose signature(s) must be provided as part of the registration process; and proof of payment of capital contributions to the new firm (€10,000 for a GmbH), of which half must be paid in cash and proof of payment provided (principally in the form of confirmation from a bank).

8. CONCLUSION

A light-touch regime might have been acceptable in a different era, but in an increasingly complex world in which transnational frauds and other crimes are perpetrated using company vehicles, ensuring the integrity of the company register must be a vital step in tackling such activity before it can gain traction. As such, it is incumbent on the government to provide the CRO with all the tools and resources it needs to do so.

There is still more work that could be done to tighten up the registration regime, given that the CRO continues to rely on the 'good faith' of registrants. Indeed, the CRO notes on its website:

'Not all errors made on statutory forms are detected or indeed capable of detection by CRO prior to registration. Statutory filings that are in order on their face are accepted in good faith by CRO and registered by the Office. Even where the filing is not in order on its face, this may not be detected prior to registration as the CRO carries out checks on statutory filings in accordance with the availability of resources and the priorities of the Office as determined from time to time by the Registrar.'[228]

There is a balance to be found between providing for ease of doing business – including the registration of new companies – and ensuring that the system is not abused.

The requirement to provide directors' PPSN numbers is an important step in helping to achieve that balance. The Austrian example of providing notarised proof of a director's signature is possibly useful, though critics might argue that it would lengthen the registration process. But verifying the identities of both directors and those registering a new company is undoubtedly one of the most important steps that can be taken to reduce registration fraud.

No matter what safeguards are in place to prevent the unauthorised use of the CRO's systems – and indeed company registers anywhere in the world – criminal groups will always try to circumvent controls. The stakes are high, since the effort invested in evading detection – even if only for a short time – can prove highly lucrative for criminals. Unless controls are robust and continually reviewed and improved to keep pace with criminal ingenuity, the 'gap under the door' will be exploited.

There is a balance to be found between providing for ease of doing business – including the registration of new companies – and ensuring that the system is not abused... Unless controls are robust and continually reviewed and improved to keep pace with criminal ingenuity, the 'gap under the door' will be exploited.

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SPECIAL PURPOSE ENTITIES IN IRELAND

ASSESSING THE SCALE, REGULATION AND RISKS

Jim Stewart*

1. INTRODUCTION

There has been considerable controversy in Ireland surrounding 'Special Purpose Entities' (SPEs). These entities have been used in conjunction with a provision in the Irish tax code with very favourable tax reliefs to facilitate raising finance, referred to as 'section 110' finance after the relevant section of the Taxes Consolidation Act 1997.[229] During the global financial crisis, section 110 SPEs were used to raise finance to 'bundle' mortgages with varying levels of risk, and to sell the resulting bundle as securitised assets. Many of these bundles turned out to be worthless.

Firms using section 110 form a key part of the Irish financial services sector. They are also part of what is described as 'shadow banking' (see section 2); that is, entities performing 'banking like activities' but which are not regulated as banks. This means they are subject to far less reporting requirements and regulation. Apart from tax reliefs, a major advantage of section 110 tax status is that it is self-declared. At the same time there have been few audits or cases of revoking section 110 tax status.[230]

The Irish financial services sector includes many types of financial firm other than SPEs and extends to all of Ireland. In this paper, the term 'Irish financial services sector' refers to the whole of Ireland, though the largest concentration of firms in this sector is in a former docklands area in Dublin, which is generally referred to as the 'Irish Financial Services Centre' (IFSC). The main attraction to locate there was the extension in 1987 of an existing 10% corporate tax for manufacturing firms, to firms located within the former docklands area. This compared with a 40% corporate tax rate for financial firms pre-1987.[231] The 10% tax rate was replaced by a general 12.5% corporate tax rate in 2001.

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2. MEASURING SHADOW BANKING

Most but not all firms operating in the Irish financial services sector can be described as being part of the shadow banking sector. 'Shadow banking' can be described as non-bank financial institutions undertaking many of the functions of banks. It is a key issue for two main reasons:

(1) It is very large. For example, the fund management sector within the Irish financial services sector is reported as being the third largest funds centre in the world, with assets of €3.78 trillion in October 2023.[232]

(2) Institutions operating in this sector are not banks and are subject to far less regulation than banks, for example in relation to liquidity ratios. The Central Bank states that the ratio of a bank's equity-to-risk weighted assets must be between 14% and 18%. There are also very close links between 'regulated banks' and shadow banks in terms of borrowing/lending and ownership.

The Financial Stability Board (FSB) is an international institution established to 'promote international financial stability'.[233] The chairman of the FSB has recently warned about the dangers of shadow banking to the global economy.[234] Similar warnings have been expressed by a member of the governing board of the European Central Bank (ECB).[235]

Data on SPEs is often taken to indicate the size of the shadow banking sector in Ireland. However, SPEs represent a small part of the overall shadow banking sector. Table (1) gives a better indicator of the size of the shadow banking sector in the country; that is, the size of foreign held assets by the Irish financial services sector for various years. This is likely to be the bulk of their total assets. SPEs account for about 18% of total foreign held assets. Many (but not all) of the entities operating in the Irish financial services sector could be considered to be part of the shadow banking sector; that is, they are performing banking-type activities, such as financial intermediation, but are not regulated as banks.[236]

Table 1: Foreign assets of firms in the Irish financial services sector (in Euro billion)[237]

Assets	Q4 2010	Q4 2013	Q4 2021	Q4 2022	Q4 2023
Portfolio	1164.4	1570.1	4278.3	3782.8	4243.8
Other investments	756.5	890.2	1566.6	1669.1	1717.8
Direct Investment	237.8	32.0	101.6	84.6	106.1
Total	**2158.7**	**2492.3**	**5946.5**	**5536.5**	**6067.7**

A far larger number of firms with similar characteristics to SPEs are not regulated by the Central Bank of Ireland. One example is aircraft leasing firms, the majority of which do not avail of 'section 110' provisions but have very similar characteristics to 'section 110' leasing firms. That is, they have no employees, are largely financed by debt and may be owned by a trust or charitable trust. Aircraft leasing firms that are excluded from Central Bank regulation are likely to be several times the size of aircraft leasing firms that are included.

The FSB estimates a broad global measure of shadow banking, which includes all financial institutions that are not banks, central banks or public financial institutions, as $217.9 trillion in 2022. A narrower definition, 'Other Financial intermediaries' (OFI), which excludes, for example, pension funds and insurance companies, is estimated to amount to $139.4 trillion.[238] An even narrower definition, to include only entities involved in credit intermediation, amounted to $63.1 trillion. The most recent report of the FSB states that 'The OFI sector was the largest sector in the Cayman Islands, Luxembourg, Ireland, the Netherlands, Canada, and the United States'.[239] Ireland had the third highest ratio of OFI asset to GDP of 32 countries, ahead of Luxembourg and the Cayman Islands.[240]

As noted above, the Irish financial services sector includes the third largest funds centre in the world. In 2023, it was about 18 times the size of Irish gross domestic product (GDP). Flows of funds into and out of this sector are likely to be many times larger. The size of assets and flows means that financial scandals and failing financial firms often have a presence in Ireland, as discussed in section 6.

3. FEATURES OF SPEs USING SECTION 110 FINANCE

The Central Bank of Ireland requires all firms using section 110 finance to provide detailed information.[241] SPEs are further divided into two categories; Financial Vehicle Corporations (FVCs), whose business is securitisation, and those firms that are not classified as FVCs are termed Special Purpose Vehicles (SPVs). These firms raise finance used by industrial and commercial companies, for example Russian-based firms.[242] Firms raising finance for aircraft leasing are another important sector.

Firms using section 110 tax status have common characteristics. For example, they have no employees, their administrative work is undertaken by corporate service providers, they have large assets, mostly financed by borrowing, and low equity. They may also be owned by a trust or a charitable trust. This latter structure is sometimes described as an 'orphan structure' as there are no parents or subsidiaries.[243]

The Central Bank does not collect data on firms with section 110 tax status incorporated in another jurisdiction, such as the Cayman Islands or Bermuda, and operating as a branch in Ireland. These are referred to as 'external companies', of which there were 3,337 in 2023. The number that are section 110 firms is not publicly available.

There are many other firms operating in the financial services sector in Ireland that are not section 110 firms but may have similar characteristics, such as no employees, ownership by a trust, large borrowing and low equity. There are, for example, many more non-section 110 aircraft leasing firms with these characteristics than section 110 firms.

The IFSC in Dublin has for many years been a major location for FVCs using section 110 finance. These are exclusively used in securitisation; that is, grouping financial assets into sub parts in order, for example, to reflect risk and maturity. The ECB regularly publishes data on FVCs in various Member States. Table (2) shows that Ireland is the main location of FVCs within the EU, followed by Luxembourg.

Table 2: Number of FVCs and gross assets (in Euro million) in the Euro area[244]

	Q4 2014	Q4 2020	Q4 2021	Q4 2022	Q4 2023	Q2 2024
Ireland	760	1396	1558	1640	1620	1596
Assets (€ million)	402.8	498.9	578.1	604.9	623.9	656
Luxembourg	651	1340	1427	1503	1503	1506
Assets (€ million)	149.9	338.6	332.0	399.0	437.5	446.9
Total	**3132**	**4589**	**4930**	**5167**	**5199**	**5105**
Assets (€ million)	**1855.7**	**2115.5**	**2223.3**	**2256.3**	**2353.4**	**2414.8**

FVCs represent a tiny part of the assets of firms in the Irish financial services sector. The fund management sector in Ireland, for example, as highlighted above, the fund management sector in Ireland is one of the largest in the world, with assets under management of €3.78 trillion in October 2023.[245]

4. DATA ON SPECIAL PURPOSE ENTITIES

The Central Bank of Ireland has considerable reporting requirements for SPEs, which includes FVCs.[246] Data for these entities is published on a quarterly basis. Table (3) shows that, for Q1 2024, there were 3,403 entities with assets of €1,104.6 billion. There has also been considerable growth in assets in recent years. FVCs accounted for over 58% of total assets for Q1 2024.

Table 3: Assets of SPEs (in Euro billion) and number of firms[247]

Year	Q4 2019	Q4 2020	Q4 2021	Q4 2022	Q4 2023	Q1 2024
Assets (€ million)	872.0	895.9	1031.3	1025.4	1103.6	1104.6
Number of firms	2603	2852	3125	3293	3391	3403

The Revenue also publishes data on SPE tax receipts, as shown in Table (4). Corporate tax receipts are low in relation to the size of assets. Value-Added Tax (VAT) receipts are negative for recent years.

One issue is that firms with no corporate tax liability are excluded. In a study of 218 aircraft leasing firms that use section 110 finance, 60% reported a tax charge in their Profits and Losses of zero or less for 2020.[248] These firms report profits of zero or less because of high interest rates, which may vary from 10–18% on loans. Profits before interest deduction are thus generally positive. Excluding firms with no tax liability means that the number of SPEs filing corporation tax returns is far higher than the number shown in Table (4). It also means that corporations with no tax liability are unlikely to receive particular scrutiny or examination from the Revenue because of low potential yield from costly tax examinations.

Table 4: SPEs and tax payments[249]

Year	No. of companies	Gross CT receipts	% of gross receipts	Net CT receipts	VAT receipts
2021	1722	103	0.5%	75	5.9
2022	2050	98	0.4%	84	-1.2
2023	2205	140	0.5%	120	-10.1

Note: Prior to 2021, section 110 aircraft leasing firms were excluded from this data.

The policy reason for excluding firms with no corporate tax payments, coupled with a relatively low number of Revenue audits, may be partly explained by the following statement by the chairperson of the Revenue Commissioners:

'We have been asked many times about how many audits we did of section 110 companies and the resources we devoted to such companies, funds and IREFs. If they are constructed not to have a tax liability, they are working as the policy intended.'[250]

The problem with this explanation is that it ignores whether current fiscal incentives are acceptable to other countries and are compatible with international agreements and EU policies. If not, even though strictly legal, they will be ended – as in the case of the 'double Irish' tax structure. In the Apple 'stateless income' case, policy deemed to be legal in Ireland was found to be illegal under EU competition rules,[251] with a consequent payment of a fine by Apple of €14 billion.[252]

5. THE HYBRID DIRECTIVE AND ITS IMPACT ON SPEs

The Base Erosion Profit Shifting (BEPS) initiative of the Organisation for Economic Cooperation and Development (OECD) led to a number of reform proposals. One of these resulted in an EU directive, commonly referred to as 'the Hybrid Directive', which was enacted into Irish legislation.[253] This directive makes rules to prevent structures that lead to 'double non-taxation',[254] referred to as 'hybrid structures'. In the case of SPEs using section 110 finance in Ireland, interest is tax deductible in Ireland and also not taxed in a member state where the income is received. This is because interest paid may vary and is thus regarded as a dividend which has already been taxed and is not subject to further tax.

Restrictions, on the level of interest that may be tax deductible, are key parts of the Hybrid Directive, which came into effect on 1 January 2022.[255] The new rules mean that net interest paid (gross interest paid minus interest received) is tax deductible, up to a limit of 30% of earnings before deduction of interest and tax (EBITDA).[256] Interest payments above that level may be deferred until they may be tax deductible. The rules could mean that, for leasing firms with high gearing levels,[257] interest payments would no longer be tax deductible. One large accounting firm stated that the new rules 'have the potential to have a significant impact on s.110 companies'.[258]

The detailed rules, as implemented, are complex.[259] They also reflect input from the professions and industry groups. For example, in a submission to the Department of Finance, another accounting firm proposed a definition of interest equivalent to mean 'interest income on all forms of debt, other income economically equivalent to interest and income earned in connection with the raising of finance'.[260]

The Finance Act 2021 reflects these requests and has a very wide definition of interest paid to include not only 'amounts economically equivalent to interest' but also any expenditures 'arising directly in connection with raising finance'.[261] As a result of these and other clauses, one Irish law firm stated that 'Most transactions involving Section 110 companies will be unaffected by the rules due to the way in which Section 110 companies are established and governed'.[262] This is because 'taxable interest equivalent' and 'deductible interest equivalent' (including interest on Profit Participating Notes) match so that the company should not have any exceeding borrowings costs. They state, 'Very helpfully and correctly from a policy perspective, "taxable interest equivalent" and "deductible interest equivalent" are defined symmetrically'.[263] An accounting firm expressed similar views, stating that Ireland has adopted a 'practical approach' in incorporating the anti-avoidance directive into Irish tax law, which 'allows taxpayers to apply (and Irish Revenue to police) the rules in a sensible manner'.[264]

An alternative view is that this and other provisions effectively undermine the stated intentions of the Hybrid Directive and OECD Action 2, designed 'to neutralise the effects of hybrid mismatch arrangements'.[265]

> **Solutions to the costs and efficacy of regulation will be found by setting up EU-wide regulatory bodies, for example the new EU Anti-Money Laundering Authority, and enhancing the scope of international bodies. It will also involve greater cooperation, including routine exchange of information, with other sovereign states.**

6. SPEs AND BANK FAILURES, FRAUD AND ILLICIT MONEY FLOWS

Due to the size of the Irish financial services sector, bank failures and frauds in other parts of the world may have a connection with Ireland. Although SPEs are a small part of the Irish financial services sector, the Central Bank has recognised that their lack of prudential regulation and increasing interconnectedness with other parts of the global financial system may make them 'vulnerable to broader market shocks', with potential threats to investors, the domestic economy and the stability and reputation of the Irish financial system.[266] During the financial crisis of 2007–2008, failed banks in the US, UK and Europe suffered significant losses from securities issued by section 110 SPEs.[267]

The organisational structure of SPEs is complex, often involving ownership in a jurisdiction, such as the Cayman Islands or Bermuda, with limited disclosure laws. In addition, widespread use of ownership by trusts or charitable trusts may further obscure the origins of finance, and disguise effective control. A Department of Finance report concluded that 'SPEs can be used for ML [money laundering], particularly if they have a complex ownership structure and they are engaging in transactions with jurisdictions with unreliable information on legal and/or beneficial ownership'.[268] The Central Bank has also acknowledged that external financing SPEs pose a 'high degree of risk' of sanctions evasion, and that SPEs' complexity and lack of transparency can make them 'vulnerable' to money laundering by transnational criminal organisations – not least because only 10% of section 110 SPEs are subject to AML supervision.[269] Others also consider that SPEs can be 'attractive to international money laundering'.[270]

Indeed, due to its size and the required resources, entities operating within the wider Irish financial services sector – including SPEs – can be difficult to regulate and to identify possible illicit financial flows. Much weight is put on professional firms, such as corporate service providers, to 'Know Your Customer' (KYC) and report suspicious activity.[271] This is difficult, as there is widespread use of holding companies and subsidiaries in other jurisdictions. As noted above, ultimate ownership may be hidden via a chain which passes through secretive jurisdictions such as Bermuda or the Cayman Islands. Even if a beneficial owner is identified on first registration of a firm, ownership may change hands readily and often. There may also be legal ways of hiding beneficial ownership, for example by ensuring that ownership of any member of a group of individuals acting in concert is less than 25%.

7. CONCLUSION

Solutions to the costs and efficacy of regulation will be found by setting up EU-wide regulatory bodies, for example the new EU Anti-Money Laundering Authority,[272] and enhancing the scope of international bodies. It will also involve greater cooperation, including routine exchange of information, with other sovereign states. One example is a proposal from the EU imposing considerable restrictions and reporting requirements on 'shell companies'.[273] These and other initiatives will necessarily involve relinquishing sovereignty in relation to regulation and taxation; measures that some Member States, including Ireland, and bodies representing industry will be reluctant to agree.

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Beneficial ownership transparency: A corporate lawyer's perspective

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Irish Limited Partnerships: The pressing case for extensive reform

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Fraudulent company registrations and the State's response

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