

EU Money Laundering Directives and the UK Trust Register: where are we?

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This insight piece gives you an overview of the key issues you may need to be aware of in relation to the EU money laundering directives and the UK trust register and explains where we are now.

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the '2017 Regulations') gives effect to the EU Fourth Money Laundering Directive ('4MLD'). Under the 2017 Regulations, which came into effect on 26 June 2017, all existing trusts (whether resident in the UK or not) that incur a UK tax liability need to be registered on a register of trusts created and operated by HMRC. The register, whilst not currently publicly accessible may be inspected by any law enforcement authority in the UK and EU member states.

Fewer than three years later, the EU Fifth Money Laundering Directive ('5MLD') has already introduced substantial changes to the trust registration regime. In particular, it removes the link with taxation and brings into scope non-EU resident trusts that own real estate within the EU, or that have a business relationship with an 'obliged entity' (broadly, an entity subject to anti-money laundering rules, such as banks, estate agents, accountants and solicitors). It has also widened accessibility to the trust register.

In spite of Brexit, amendments to the 2017 Regulations implementing the 5MLD came into force on 10 January 2020. Interestingly, these did not include the changes required to the UK's Trust Registration Service ('TRS') which have been delayed in light of the complexities which arose during the initial consultation process in 2019 (the '2019 Consultation'). HMRC published a further consultation paper on 24 January 2020 (the '2020 Consultation'; which runs to 21 February 2020) in order to test whether the draft legislation transposes the 5MLD in a 'proportionate' way whilst satisfying the directive's anti-money laundering goals. It appears that a number of the concerns raised during the 2019 Consultation have now been addressed, but several questions remain unanswered.

Who is now required to register?

Under the existing draft legislation, the TRS will be expanded to apply to UK express trusts and certain non-EU resident express trusts irrespective of whether the trust has incurred a tax liability, unless they fall within an 'out of scope' list, as set out below:

- statutory trusts (e.g. a statutory trust arising on intestacy);
- trusts arising as a result of statutory requirements (e.g. tenant's service charge contributions protection trusts);
- trusts of land where a joint ownership trusts exists solely for the purposes of owning a home with a partner, relation or friend;
- trusts arising where two or more people co-own an asset and the legal and beneficial owners are the same, with concurrent and not successive interests (e.g. a bank account or shareholding);
- certain express trusts established to meet legislative conditions (e.g. maintenance fund trusts for historic buildings, vulnerable beneficiary trusts and personal injury trusts);
- trusts consisting solely of an insurance policy which is a pure protection policy and payment is not made until the death or terminal illness of the insured;
- registered pension schemes held in trust which are subject to regulation by either the Financial Conduct Authority or the Pensions Regulator;
- charitable trusts; and
- trusts already registered in another EU member state.

This is welcomed news. However, the status of certain other trusts remain subject to review. The UK Government will continue to explore whether bare trusts should also be excluded from scope.

As for the circumstances in which a business relationship would trigger registration via the TRS, we note that 'business relationship' is not specifically defined in the 5MLD but it is used in its meaning as defined in the 4MLD: *"A business relationship means a business, professional or commercial relationship that is connected with the professional activities of an obliged entity and which is expected, at the time when the contact is established, to have an element of duration."*

Concerns have been raised that a non UK resident and non EU resident trust receiving services such as banking, accounting or legal services on an ongoing basis from an obliged entity based in the UK (such as an accountancy firm or a law firm) might be required to register on the TRS. The 2019 Consultation document suggested an element of duration to encompass working interactions of 12 months or more. The 2020 Consultation paper does not address the business relationship concerns. This is one of the areas which is still under discussion with HM Treasury and we expect that detailed guidance will follow shortly.

Who can access the information?

TRS data will be shared via three distinct channels, subject to protective mechanisms to prevent a 'disproportionate risk' to the beneficial owner:

- an application process for 'legitimate interest' and 'third country entity' requests, for third parties to gain trust data;
- a mechanism for obliged entities (i.e. those entering into a business relationship with a trust) to receive (i) proof of registration on a trust register, or (ii) an excerpt of the register, managed by the trustee through TRS; and
- the existing and continuing arrangements for law enforcement agencies.

The first of these has caused some concern – the 'legitimate interest' concept is not defined in the 5MLD and was thought to be sufficiently wide to include investigative journalists and NGOs with an anti-corruption profile. In an attempt to balance the beneficial owner's right to privacy against the need for transparency, the 2020 Consultation paper proposes stringent controls to establish the existence of a 'legitimate interest.' Access requests must therefore be made in relation to a specific instance of suspected money laundering or terrorist financing activity and form part of an investigation into this instance.

Access to beneficial ownership information on TRS may also be granted to a third party where a trust holds a controlling interest (defined as a direct or indirect holding of more than 50% of the shares or voting rights) in a non-EEA legal, entity which is not required to be registered on a corporate beneficial ownership register in an EU member state.

What are the deadlines for registration and penalties for non-compliance?

New deadlines for registration will be introduced as follows:

- trusts in existence at 10 March 2020 must register by 10 March 2022;
- trusts set up after 10 March 2020 must register within 30 days or by 10 March 2022, whichever is later; and
- trusts set up on or after 10 March 2022 will have 30 days to register.

A new penalty regime will be introduced for non-compliance, but the penalties do not appear particularly severe at this stage. A 'nudge letter' will be issued on the first offence of failure to register or update details within the required time frame and a £100 penalty for each subsequent offence. Where deliberate non-compliance occurs, trustees may be subject to an immediate financial penalty, rather than a notification.

Where are we now?

Where a trust is already registered on TRS under 4MLD, some additional information will need to be provided in order to fulfil the requirements of the new 5MLD (including whether or not a trust holds a controlling interest in a third party entity). The 2020 Consultation suggests that, until 10 March 2022, all trusts that incur a tax liability for the first time should register on TRS under the current process in place for 4MLD and tax registration purposes. In the meantime, trustees and their agents should watch this space!

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