

Consultation on the Transposition of 5MLD
Sanctions and Illicit Finance Team (2/27)
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

By email: Anti-MoneyLaunderingBranch@hmtreasury.gov.uk

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Dear Sirs

Transposition of the Fifth Money Laundering Directive: consultation

We welcome the opportunity to comment on the Transposition of the Fifth Money Laundering Directive and apologise for the lateness of our submission.

ICSA: The Governance Institute is the professional body for governance. We have members in all sectors and our Royal Charter purpose is to lead 'effective governance and efficient administration of commerce, industry and public affairs'. With more than 125 years' experience, we work with regulators and policy makers to champion high standards of governance and provide qualifications, training and guidance. ICSA is the professional body that qualifies Chartered Secretaries, which includes company secretaries. Company secretaries have a key role in companies' governance arrangements, including the audit function. Our members are therefore well placed to understand the issues raised by the directive and its transposition.

We offer below some general comments and then some specific answers to the questions raised in the call for views. Given the wide-ranging nature of the consultation, we have focussed the latter on those areas in which our members have particular knowledge and experience.



General comments

Transposition of the Directive requires a number of balances to be struck to ensure proportionality. We understand that the Directive offers very little scope for carve outs, exemptions, or de minimis thresholds but we would urge the Government, in the transposition process, to take advantage of every opportunity that there is. As the consultation document notes, “trusts are an intrinsic part of the UK’s legal system and have been in use for centuries. The government wishes to ensure that the many UK individuals and companies using trusts continue to benefit from the various legitimate advantages that they provide, while also taking steps in line with the requirements of 5MLD to ensure that trust structures do not facilitate money laundering or terrorist financing. To this end, the government recognises that the NRA concludes that UK trusts present a low risk of money laundering and terrorist financing, and is keen to ensure that the registration process – and any associated penalty regime – is applied proportionately.”

With this in mind, we would strongly recommend that the Government seek a solution whereby Employee Ownership Trusts and Employee Benefit Trusts can be lifted outside the definition of an ‘express trust’. Not only will the inclusion of these vehicles, which we would suggest are particularly low risk, impose significant additional compliance requirements, and associated costs, upon those engaged with the management of such trusts, it is likely that service providers will seek to pass these costs on to the settlor companies, thereby disincentivising them from making shares available to employees, which we believe to be against the Government’s UK public policy.

Perhaps more importantly, the number of beneficiaries involved can be significant with hundreds, thousands or, in the case of the very largest SIPs, hundreds of thousands of beneficiaries. We believe it important to establish a mechanism whereby the personal details of these private individuals are exempt from registration requirements and from capture within the definition of ‘legitimate interest’ which we believe should be restricted to legitimate law enforcement organisations and activities.

By way of precedent, accepting that it is a different piece of legislation, the Disguised Remuneration Regulations included sensible, limited carve-outs which maintained employee share plans’ effectiveness without any risk to or undermining of the legislation’s central purpose.

The accuracy of data held at Companies House is critically important – if it is to be relied upon it must be accurate and so we welcome legislative and regulatory action in this area. That said, it is important that whatever steps the Government takes in the implementation of this Directive chime with the work that the Department for Business, Energy and Industrial Strategy (BEIS) and Companies House are doing in their current consultation on Corporate Transparency and Register Reform as it will be necessary for Companies House to be given the specific powers necessary to take corrective action and apply appropriate sanctions in such cases.

Responses to specific questions

Cryptoassets

Q.14. Should the FCA be assigned the role of supervisor of cryptoasset exchanges and custodian wallet providers? If not, then which organisation should be assigned this role?

This would appear to be an appropriate role for the Financial Conduct Authority.

Obligated entities: beneficial ownership requirements

Q.53. Do respondents agree with the envisaged approach for obliged entities checking registers, as set out in this chapter (for companies) and chapter 9 (for trusts)?

Broadly yes but, where the register is public, the onus should be on the obliged entity to obtain the information direct as this will obviate the possibility of the trust or company falsifying documentation.

Q.54. Do you have any views on the government's interpretation of the scope of 'legal duty'?

No. This seems proportionate.

Q.55. Do you have any comments regarding the envisaged approach on requiring ongoing CDD?

No. This seems proportionate.

Mechanisms to report discrepancies in beneficial ownership information

Q.61. Do you have any views on the proposal to require obliged entities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House?

No. This seems sensible and proportionate.

Q.62. Do you have any views on the proposal to require competent authorities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House?

No. This seems sensible and proportionate.

Q.63. How should discrepancies in beneficial ownership information be handled and resolved, and would a public warning on the register be appropriate? Could this create tipping off issues?

This is a question that should be referred to BEIS and to Companies House, given the current BEIS consultation on Corporate Transparency and Register Reform as it will be necessary for Companies House to be given the specific powers necessary to take corrective action and apply appropriate sanctions in such cases. There is a risk of 'tipping off' were a public warning to be placed on the register, but proportionality is key and the decision as to whether or not to make such a note should be delegated to Companies House.

Trust registration service

Q.64. Do respondents have views on the UK's proposed approach to the definition of express trusts? If so, please explain your view, with reference to specific trust type. Please illustrate your answer with evidence, named examples and propose your preferred alternative approach if relevant.

The definition is reasonable but, as noted in our general comments, the Government should ensure that the definition is so crafted that Employee Ownership Trusts and Employee Benefit Trusts can be lifted outside the definition of an 'express trust'. Not only will the inclusion of these vehicles, which we would suggest are particularly low risk, impose significant additional compliance requirements, and associated costs, upon those engaged with the management of such trusts, it is likely that service providers will seek to pass these costs on to the settlor companies, thereby disincentivising them from making shares available to employees, which we believe to be against the Government's UK public policy.

Perhaps more importantly, the number of beneficiaries involved can be significant with hundreds, thousands or, in the case of the very largest SIPPs, hundreds of thousands of beneficiaries. We believe it important to establish a mechanism whereby the personal details of these private individuals are exempt from registration requirements and from capture within the definition of 'legitimate interest' which we believe should be restricted to legitimate law enforcement organisations and activities.

By way of precedent, accepting that it is a different piece of legislation, the Disguised Remuneration Regulations included sensible, limited carve-outs which maintained employee share plans' effectiveness without any risk to or undermining of the legislation's central purpose.

Q.65. Is the UK's proposed approach proportionate across the constituent parts of the UK? If not, please explain your view, with reference to specific trust types and their function in particular countries.

Yes.

Q.66. Do you have any comments on the government's proposed view that any obligation to register an acquisition of UK land or property should mirror existing registration criteria set by each of the UK's constituent parts?

No. This seems sensible and proportionate.

Q.67. Do you have views on the government's suggested definition of what constitutes a business relationship between a non-EU trust and a UK obliged entity?

No. This seems sensible and proportionate.

Q.68. Do you have any comments on the government's proposed view of an 'element of duration' within the definition of 'business relationship'?

No. This seems sensible and proportionate.

Q.69. Is there any other information that you consider the government should collect above the minimum required by 5MLD? If so, please detail that information and give your rationale.

No. Moreover, personal information should not be collected or shared, where a beneficiary is interested in less than 25% of the trust assets or the trust holdings are below a threshold. In the UK, unlike many other Member States, it is not unusual for a trust to act on behalf of many beneficiaries – for example and Employee Ownership Trust may hold assets on behalf of all employees of a company. Collecting this data would be disproportionately onerous and its sharing would place personal data into the public domain in an unacceptable manner. Similarly, many trusts are relatively small and pose no threat from a MLD perspective.

Q.70. What is the impact of this requirement for trusts newly required to register? Will there be additional costs, for example paying agents to assist in the registration process, or will trustees experience other types of burdens? If so, please describe what these are and how the burden might affect you.

This will create significant compliance costs for trusts and for the Government authority required to store the data.

Q.71. What are the implications of requiring registration of additional information to confirm the legal identity of individuals, such as National Insurance or passport numbers?

This is reasonable and proportionate where the individual controls or is beneficiary of significant assets. It is neither reasonable nor proportionate where a beneficiary is interested in less than 25% of the trust assets or the assets held in trust are small.

Q.76. Do you have any comments on the proposed definition of legitimate interest? Are there any further tests that should be applied to determine whether information can be shared?

Yes. The definition should be drawn more tightly to restrict access to legitimate law enforcement activities. As drafted there appears a risk that it could be available to non-governmental organisations lobbying in this field or to those making speculative enquiries. It is of critical importance, given the circumstances in which, as the consultation document states, trusts are widely used that the definition of 'legitimate interest' is drawn as tightly as possible in order to preserve the privacy of the beneficiary. It should certainly not include, for example, journalism or the commercial interests of the requestor.

If the definition is restricted to law enforcement, there should be no necessity for a charge to be made.

Q.77. Do the definitions of 'ownership or control' and 'corporate and other legal entity' cover all circumstances in which a trust can indirectly own assets through some kind of entity? If not, please set out the additional circumstances which you believe should be included, with rationale and evidence.

Yes. This seems a sensible approach.

We hope you find our comments helpful and would be happy to expand on any of these points should you wish to discuss them further.

Yours faithfully

Peter Swabey

Policy & Research Director