

Transposition of the Fifth Money Laundering Directive
Consultation Response: Wedlake Bell LLP

Wedlake Bell LLP is a central London law firm over 200 years old. It has 67 partners and is one of the top 100 firms in the UK on turnover.¹

The firm welcomes the opportunity to respond to HM Treasury's consultation document "Transposition of the Fifth Money Laundering Directive " dated April 2019 ("**the Consultation Document**").

Wedlake Bell's response has been prepared by its Private Client team and is limited to those aspects of the Consultation Document dealing with trusts and other similar structures (as set out in Chapter 9 of the Consultation Document entitled "Trust registration service") as these are most important to its client base.

Wedlake Bell's Private Client team has extensive experience of setting up and advising on trusts, administering trusts and estates, and acting for parties involved in contentious trust and probate claims. The size of trust or estate the team usually administers and/or advises on would generally range from £1million to £20million.

The team is ranked in the Legal 500 2019 (tier 3) and was a finalist in the Society of Trust and Estate Practitioners (STEP) Private Client Awards 2018 for "Private Client Legal Team of the Year" (mid-size). Wedlake Bell was awarded "Law Firm of the Year – London" in the Citywealth Magic Circle Awards 2018 and came runner up in 2019, with the Private Client group's leader Camilla Wallace winning "Woman of the Year".

Box 9.A: Definition of express trust

Question 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.

5MLD mandates the registration of:

1. all UK resident express trusts;
2. non-EU resident express trusts that acquire UK land or property on or after 10 March 2020; and
3. non-EU resident express trusts that enter into a new business relationship with an obliged entity on or after 10 March 2020.

The definition of UK resident in paragraph 9.7 is similar but not the same as the usual test for residence for income tax and Capital Gains Tax (CGT) purposes, where either all the trustees are resident in the UK or there is a mixture of resident and non-resident trustees and, at the "relevant time", the settlor was either resident, domiciled or deemed domiciled (or, where the relevant time was before 6 April 2013, ordinarily resident in the UK). Applying the same test would be simpler.

Paragraph 9.7 does not elaborate on how a non-EU resident express trust is to be defined. Using the definition of UK resident we know whether a trust is resident in the UK or not, but we do not know its residence status in other jurisdictions. It is unclear whether the same test will be applied to each potential jurisdiction, or if local law will be applied to each jurisdiction.

¹ The Lawyer's top 200 UK law firms 2018 by revenue (ranking: 83)

The UK proposes to define "express trusts" as a trust that was expressly (i.e. deliberately) created by a settlor as opposed to being created in other ways, for example, through a court order or by statute. This definition will mean a much wider range of trusts will need to be registered, and will include co-ownership of land, insurance and dormant trusts, as well as many family, charitable and other non-business trusts. We believe that making these trusts subject to trust registration is unnecessarily administratively burdensome particularly given that it is accepted the majority of express trusts do not carry money laundering or terrorist financing risks, and that the Land Registry already provides a register for the co-ownership of land. These express trusts should not therefore be subject to trust registration unless there is a chargeable event. Furthermore, registering insurance trusts and dormant trusts which are waiting to receive funds on a specific event, often death, is futile and potentially unworkable as there will be no funds in the trust to cover the administrative costs of registering the trust and non-professional trustees will not be aware of the need to register as they will not be receiving active advice due to the trust's dormant nature. Such trusts should not be liable for registration. Dormant trusts in HMRC's records should also not be liable for registration.

"Many types of bare trust" is listed in paragraph 9.12 as one of the examples of the categories of UK trusts that are likely to fall within the definition of an express trust, however it is arguable as to whether a bare trust satisfies the description in paragraph 9.5 or the three certainties set out in paragraph 9.11 (in particular words and intention) and therefore is not an express trust. If it is intended that some bare trusts are to be excluded it would be helpful to have guidance on this. If the onus will be on trustees and their agents to determine whether their trust is an express trust or not, it is unclear whether their judgement will be upheld if it differs from HMRC's view, and if any penalties will be issued as a consequence. Furthermore, it will be difficult to relay new compliance obligations to the nominees or trustees of bare trusts if they do not engage advisors. Under 4MLD, only details of those beneficiaries who have received a benefit from the trust are recorded on the Trust Registration Service (TRS). It is unclear if this will still be the case under 5MLD.

A better approach would be for the government to focus on categorising those express trusts (that do not incur tax consequences) that do present a clear money laundering or terrorist financing risk. Identifying these through explicit reasoning might help the government to explain why it is risking the infringement of individuals' right to privacy in such a blanket manner. The current reasoning does not justify blanket encroachment especially as the government itself has identified that trusts present a low risk of money laundering and terrorist financing.

The government is considering whether there are other registration services already in existence for particular trust types that could fulfil the 5MLD registration requirement in order to avoid duplicate registration wherever possible (paragraph 9.15). This could include the Land Registry and Register of overseas owners of real estate. Trusts which incur Inheritance Tax charges already provide information on settlors and beneficiaries if they receive a capital distribution. Paragraph 9.16 states that trusts within the EU are only required by 5MLD to register once and therefore if a trust has an entry on a register in another Member State there is no requirement to register on the UK's Trust Register. It is unclear whether it is simply a case of registering in any of the relevant member states, or if there will be a mechanism for determining which is the relevant member state. In any case, only non-EU, non-EEA or UK trusts need to register in the UK and so these trusts would not be required to register anyway unless they can somehow be resident in both the UK and another member state.

Question 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.

We do not believe the proposed approach is proportionate. Paragraph 9.6 of the Consultation Document notes that the government recognises the NRA's conclusion that UK trusts present a low risk of money

laundering and terrorist financing, and therefore the government understands the need for proportionality. It is difficult to see how the proposed definition of "express trust" would respect this.

Question 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?

This approach seems sensible. Non-EU trusts acquiring land or UK property will be required to register their acquisition of such property with the TRS in line with existing registration criteria set by the UK's constituent parts. In England the Land Registry requires freehold estates or estates with a leasehold of over 7 years to be registered, and the TRS would follow this format.

Question 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?

If this will apply as suggested in paragraph 9.19 to non-EU resident express trusts which have one UK trustee, but a non-UK settlor and no other connection with the UK, the definition is very wide and could include some of the offshore trusts which we advise.

Box 9.B: Data Collection

Question 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.

We note that the government may choose to collect additional information such as National Insurance and/or passport numbers but that this will be considered further during the technical consultation later in the year. The suggestion that the government is not inclined to continue to collect the full range of information currently required within the existing version of TRS, and will take this opportunity to review and ideally reduce the amount of information collected, is only to be welcomed.

Question 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 requirement will certainly incur additional costs for trusts. While registering new trusts may be less problematic, significant work will be required to identify existing trusts which need to be registered, and it is unclear how these costs will be met if there are no liquid assets within that trust. A concession for some existing trusts may alleviate part of the burden.

Question 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?

Trustees are already collecting this information under 4MLD.

Box 9.C: Registration deadlines

Question 72: Does the proposed deadline for existing unregistered trusts of 31 March 2021 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.

Although this deadline gives a long lead time, more time might be needed considering the number and nature of affected trusts.

Question 73: Does the proposed 30 day deadline for trusts created on or after 1 April 2020 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.

This is an ambitious deadline and could be extended to 60 days. We note that trustees and/or agents will be subject to the same deadline to update TRS with any amendments, such as change of contact details. It is key that this deadline should start from when they become aware of such a change as it is not always the case that clients alert us to such changes immediately.

Question 74: Given the link with tax-based penalties is broken, do you agree a bespoke penalty regime is more appropriate? Do you have views on what a replacement penalty regime should look like?

A bespoke penalty regime would be appropriate and could be based on the number of days by which registration is delayed.

Box 9.D: Data sharing with obliged entities

Question 75: Do you have any views on the best way for trustees to share the information with obliged entities? If you consider there are alternative options, please state what these are and the reasoning behind it.

We note that the government will consult on this later in the year but envisages an option for trustees to print out a summary of their trust registration and other details from TRS for them to share with an obliged entity. We agree that the obliged entity who wishes to enter into a business relationship will be best placed to obtain proof of registration from the trustee, and that this option is sensible. The trustees together with their agents should have online access to the TRS, and this should be available to view via the same platform as the trust's tax position.

Box 9.E: Data sharing for legitimate interest requests

Question 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?

We note that the government proposes to define this narrowly and in line with the purpose of 5MLD to combat money laundering and terrorist financing, which we fully endorse. Paragraph 9.45 of the Consultation Document notes that those with a legitimate interest will have active involvement in anti-money laundering or counter-terrorist financing activity, have reason to believe that the trust or person that is the subject of the legitimate interest enquiry is involved with money laundering or terrorist financing, and have evidence underpinning that belief. Active involvement should be defined, and the evidence disclosed. The reference to "persons with legitimate investigative roles" in paragraph 9.46 suggests that journalists may satisfy the criteria, which would be a concern. In addition to a right of appeal, which we agree is a good idea, it may be appropriate to have a system of penalties if it is found after the event that a request has been made without due cause. The government may also wish to consider if there is scope for an additional step of notification to the beneficial owner who would have the opportunity to comment on the reasons why they believed their right to privacy outweighed the applicant's legitimate interest to access their information. We hope that the government would require strong evidence of illegality before agreeing to a legitimate interest application, as it is only with a rigorous threshold that trust users who are complying with the law and using trusts for legitimate purposes can be confident that their privacy will be respected

Box 9.F: Data sharing on trusts owning non-EEA companies

Question 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.

5MLD allows "any legal person" to access data on an express trust that holds or owns a controlling interest in any corporate or other non-EEA legal entity. Public listed companies would be included within the scope of "corporate entity". We would agree the definitions cover all circumstances, however, we would comment that "any legal person" is extremely wide and question whether the data to which they can have access could be restricted. It is not unusual for an offshore trust to own an offshore company which in turn holds assets, which can, for example, include UK land and under the current proposal "any legal person" could access this data.

Question 81: The government is interested in your views on the proposal for sharing data. If you think there is a best way to share data, please state what this is and how it would work in practice.

Under 5MLD, data will be shared with persons who want to know about trusts with a controlling interest in a non-EEA company, and there is no requirement for a legitimate interest in this case. Therefore as little data as possible should be disclosed in these circumstances, together with a restriction that the person requesting the information be prevented from sharing the data with anyone else.

The government anticipates withholding information on minors and vulnerable adults, which we fully support, however it is questionable as to why the government needs to hold details about such trusts that do not incur tax consequences. Collecting information without any intention to use it for a particular legal and justifiable purpose seems to go against the right to respect for private and family life, home and communications provided in Article 8 of the European Convention on Human Rights.

Wedlake Bell LLP

10 June 2019

Ref: ATKE