

The UK trusts register – cause for optimism?

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What is the UK Trusts Register and how does it operate?

The fourth Anti-Money Laundering Directive ("AMLD 4") has been operative since 26 June 2017 and, amongst other measures, required EU Member States to implement a central register of beneficial ownership for trusts. The UK, compliant with these requirements, introduced the UK Trusts Register by way of regulations (the "**Regulations**") and this trust registration service (the "**TRS**") is operated by Her Majesty's Revenue and Customs ("**HMRC**"). Access to data on the TRS is limited to HMRC who may also share data contained on TRS with other UK law enforcement authorities. Fundamentally access to data on TRS is not open to the public.

What is Jersey's position on public registers?

Jersey's position on public registers of beneficial ownership of companies was helpfully clarified in Geoff Cook's Jersey Finance paper dated 31 March 2017. In short that the introduction of a public register of beneficial ownership of companies would not be in the interests of Jersey. Further that Jersey's existing model regarding beneficial ownership of companies meets, and exceeds, the standards set by the UK's public register and further FATF requirements on collection, verification and monitoring. The paper also refers to Moneyval's positive conclusion on Jersey's transparency and ownership of legal persons and further the international rejection of public registers outside of the EU.

One of the key concerns highlighted is that many public registers are or will be entirely reliant upon corporate service providers self-reporting outside of the regulated sphere which makes them vulnerable to abuse and criminal activity.

Do public registers breach an individual's right to privacy and protection of data?

On 2 February 2017, the European Data Protection Supervisor published its opinion on AMLD 4 and commented that public registers "*depart from the risk-based approach adopted by the current version of the AML Directive*" and display "*a lack of proportionality, with significant unnecessary risks for the individual rights to privacy and data protection*". Fundamentally he

concluded that access to beneficial ownership information should be available "*to entities who are in charge of enforcing the law*".

Noting that the rationale for many trusts is to structure private family assets these concerns are brought into even sharper focus when considering a public register of trusts. Plainly there are fundamental legal principles at the heart of the issue on public registers. On this note the French Constitutional Court on 22 July 2016 suspended the publicly-accessible register of trusts in France, containing ultimate beneficial ownership information, on the basis that it conflicted with the French Constitution and disproportionately infringed an individual's rights to privacy.

Which Jersey trustees are caught by the UK Trusts Register and what is the penalty for breach?

The Regulations apply to both UK resident and non-UK resident trustees (to include Jersey resident trustees) who must consider whether or not they are caught by the requirements of the Regulations. A Jersey resident trustee is subject to the obligations to maintain a register of beneficial owners and register with, and provide information to, HMRC if the trust receives UK source income or holds UK assets on which the trust is liable to UK income tax, CGT, IHT, stamp duty land tax or stamp duty reserve tax.

Sanctions for breach include civil penalties and statements of censure by HMRC and indeed criminal sanction although HMRC has clarified that the offence must be proportionate to the offence committed. Of course many Jersey trust companies have UK operations and close connections with the UK in terms of travel and business relationships and will wish to avoid breach of the Regulations and the potential reputational damage. For these reasons it seems likely that Jersey trust companies will comply with the Regulations.

If caught what information will need to be disclosed to HMRC?

For trusts which are caught trustees will need to disclose to HMRC the identities of all settlors, trustees, beneficiaries named in the trust, where there is a class of beneficiaries any beneficiary in the class who has received a benefit and is therefore *identified* and any individual who has *control* over the trust. Power holders will be treated as having *control* over the trust, if for example, they are vested with reserved investment powers or the power of appointment or removal of trustees (note: HMRC give a number of examples here). Trustees must also register details of any individuals identified in a letter of wishes or similar document from the settlor outside of the trust which is a significant extension of what we have seen to date in terms of FATCA and CRS reporting.

Are there any planning opportunities for Jersey trustees?

There are potential planning opportunities for Jersey trustees arising from the Regulations where settlors and trustees would prefer not to register and provide the information perhaps

where the connection to the UK is tenuous or where there are material confidentiality concerns – protectors and other power holders may wish to step down, references to individual beneficiaries could be removed unless distributions are required, individual beneficiaries may need to be described by class rather than by name, a company may be interposed to hold the UK asset and some trustees may ultimately decide to dispose of the UK asset.

Of course Jersey trustees should take UK tax advice and Jersey law advice on the trust documentation as required.

Is the net likely to widen in terms of who will have access to data on TRS?

At the moment trustee data on TRS may be shared by HMRC with UK enforcement agencies only. However, is the net likely to widen?

On 20 December 2017 the latest round of amendments to the Anti-Money Laundering Directive were agreed between the European Parliament and the Council. The rationale for the amendments was stated to be to increase transparency within the EU by granting public access to beneficial ownership registers. These amendments ("**AMLD 5**"), which will amend AMLD 4, were tabled by the European Commission as a reaction to the revelations in the Panama Papers in April 2016 and the multiple terrorist attacks on EU soil in 2016.

The final text of the amendments has yet to be published but according to a factsheet published by the Commission the new measures will not allow full public access to beneficial ownership registers of trusts. Fundamentally it is recognised that trusts may be set up for non-commercial purposes (e.g. for the use of preservation of family assets or charity). Access to data about the beneficial owners of trusts will likely be accessible to law enforcement authorities and professional bodies subject to anti-money laundering rules, such as banks and lawyers. It is anticipated that trust beneficiary information will also be accessible to third parties who can "*demonstrate a legitimate interest*". Whilst clarity on no public access is good news AMLD 4 did not define *legitimate interest* albeit AMLD 5 is understood to provide clarification on this key issue. It is also not clear at this stage whether it will be left to individual Member States to define *legitimate interest* in which case this could result in a material divergence of interpretation and application.

In terms of timing the Commission anticipates that AMLD 5 will be published in mid-2018 and will come into force by the end of 2019. Further that national beneficial ownership registers of trusts will be accessible to persons with a legitimate interest in early 2020. This timing may be optimistic in terms of Member States being able to implement the proposed changes by the end of 2019 when you consider that a number of Member States have still to transpose AMLD 4 into their domestic legislation. There also remain material practical questions about how each EU Member State will operate these registers in practice.

What is the UK's position on all of this and does this support Jersey?

The UK Government has now very helpfully confirmed in a letter dated 17 January 2018 from HM Treasury to the European Scrutiny Committee that it is opposed to *public access* to the trust register and further expressly recognised that many trusts are established for personal or family reasons. This is significant in our view. The letter states that whilst the register is a valuable tool for law enforcement authorities that can access information on it, the Government is opposed to granting public access to such information so as to protect individual privacy rights. Of course Jersey's concerns mirror those of the UK when it comes to privacy and the use of trusts noting that trusts are commonly used in the UK for onshore structuring purposes. This is a very positive development notwithstanding that there remain significant issues still to be determined.

Cause for optimism but what are the fundamental issues still to be determined?

In terms of the implementation of AMLD 5 there remain a number of fundamental issues yet to be determined:

- the final text of the amended Directive still needs to be published and analysed;
- the definition of *legitimate interest* and who will be able to demonstrate a *legitimate interest* will be key;
- precisely where the division will fall between trusts established for commercial purposes and trusts established for personal or family reasons;
- whether AMLD 5 will comply with data protection legislation and the right to the protection of personal data enshrined in Article 8 of the Charter of Fundamental Rights ("**Charter**");
- whether AMLD 5 will comply with the fundamental right to privacy enshrined in Article 7 of the Charter;
- how each Member State will operate, regulate and finance its registers in practice (many of these Member States being civil law jurisdictions are simply not familiar with trusts); and
- the impact Brexit is likely to have on the UK's acceptance of EU legislation.

What is the conclusion?

Watch this space as there are plainly still significant issues which have yet to be determined but on the positive side there will be no full public access to national beneficial ownership registers of trusts. It is also a hugely positive development that the UK Government has expressly recognised the privacy issue at the heart of any public register on trusts. On this point it seems plain that access to trust registers should be limited to enforcement agencies only.

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