Transposition of the Fifth Money Laundering Directive: consultation responses

Inheritance Tax and trusts

01 August 2019

The ATT and CIOT have responded to the HMT Consultation on the Transposition of the Fifth Money Laundering Directive (5MLD) published on 15 April 2019 commenting on the implications for trusts and their trustees.

The stated objective of the transposition is to ensure that the UK's anti-money laundering and counter-terrorist financing (AML/CTF) regime is kept up to date, effective and proportionate. The government intends that the new provisions will come into force in national law by 10 January 2020, in line with Article 4 of 5MLD.

Chapter 9 (Trust Registration Service) 5MLD expands the scope of the Trust Registration Service (TRS) by requiring trustees or agents of all UK and some non-EU resident express trusts, within the sense intended by the Directive, to register those trusts with the TRS, whether or not the trust has incurred a UK tax consequence. It also requires the government to share data from the register with a range of persons under certain circumstances.

ATT response

The ATT focused its comments on Chapter 9 of the consultation and the implications for UK resident trustees, and endorsed the CIOT response to other areas of the consultation.

Implementation of the Directive will significantly expand the scope of the existing register and the sheer scale of this task cannot be underestimated. Given the low level of understanding of trusts by the general public, we think that it will be extremely hard to identify and register all the express trusts in existence which are

affected by the new rules.

Guidance: The government does not expect to specify a full list of types of *express* trust that need to register. Instead, the onus will be on trustees and agents to determine if the definition is met. We are concerned that unrepresented trustees – and those who cannot access funds from the trust to meet the costs of advice – will struggle to comply without robust guidance. While it will be impossible to list all the situations where an express trust might arise, guidance which covers a significant proportion of possible situations is essential and a clear list of both what is, and what is not, intended to be registered is needed.

Data collection: The consultation recognises that data collection for the existing Trust Register is onerous. We called for the removal of the current requirement to provide National Insurance numbers for individuals, which is inconsistent with the information required for directors/shareholders at Companies House. We see no reason to collect different information based on whether or not the trust pays tax. The purpose of the Register is to gather information on ownership and, since some trusts pay tax in some years but not in others, consistent requirements regardless of tax status will avoid confusion.

The burden of data collection will increase under the new Directive as it requires trustees to provide details of nationality and residency for all beneficial owners.

Timescales: The ATT considers that the proposed deadline of 31 March 2021 to register all existing trusts which have not previously registered is insufficient given the numbers involved and we called for this period to be extended.

For new trusts, the requirement to register within 30 days will be impractical or impossible in some circumstances. For example, it is too short a period where a trust is created on death. We suggested that trustees should have a year from the date of the settlor’s death to report the creation of the trust – which would tie in with the deadline for reporting IHT charges.

Penalties: We agreed that a tax-based penalty system is no longer appropriate where registration is not linked to tax consequences and suggested that a series of modest fixed penalties increasing with the period of the delay, together with an appeals process, would seem reasonable. Penalties need to be proportionate where it is clear that there has been no deliberate failure to register. We would like to see HMRC continue their risk-based approach to charging penalties and a period of grace

in which trustees who have only just become aware of their obligations can comply.

Data sharing: Under the Directive, trustees will be required to prove to new advisers that the trust is registered. We suggested that this could be done electronically, with trustees authorising the Register to release data directly to whoever needs it.

Legitimate interest: Under the Directive, anyone with a legitimate interest will be able to request certain information on trusts on the Register. The ATT is concerned that, without appropriate safeguards such as a right of appeal, the risk of loss of privacy could deter people using trusts even when a trust would otherwise be an appropriate solution.

The ATT response can be found on the ATT website.

CIOT response

We noted the government's recognition that UK trusts present a low risk of money laundering and terrorist financing, and its keenness to ensure that the registration process is applied proportionately, an approach that is consistent with the Directive.

5MLD does not define a trust, but leaves it to each state to determine which types of trust or similar legal arrangement are comparably similar to a corporate or other legal entity. In arriving at that determination, CIOT indicated that the Directive should be construed purposively. Accordingly, as the Directive is aimed at registration of the beneficial ownership of 'entities', CIOT's position is that only where a UK trust may constitute an 'entity' comparable to a corporate, should it fall to be registered.

UK law often employs a trust mechanism where the approach in most European jurisdictions would be contractual (and thus clearly outside of the scope of 5MLD). To reflect appropriately the intent of the Directive in UK law and effectively fight money laundering with proportionate measures, we believe that the definition for a UK express trust should be informed by the current widely-recognised UK tax definition: property held in trust other than property held by a person as trustee for another person who is absolutely entitled to the property as against the trustee. Where a person is absolutely entitled to trust property, we submit that it is not held in a separate 'entity' in the sense intended by the Directive.

By applying the Directive’s approach purposively and using an existing and sensible UK definition, most bare trusts and nominee arrangements would not require registration.

CIOT is concerned that there are currently insufficient safeguards to prevent disclosure of personal information about trustees and beneficiaries to someone claiming to have a ‘legitimate interest’ in such disclosure. We believe that an ombudsman should determine such requests.

In relation to requests for information on trusts holding non-EAA companies, it appears implicit in the proposal that the person making the request must be able at least to identify the trust which is the object of the enquiry.

The CIOT response can be found on the CIOT website.