Chartered Institute of Taxation

30 Monck Street
London SW1P 2AP
T: +44 (0)20 7340 0550
E:post@ciot.org.uk

HMT Consultation on the Transposition of the Fifth Money Laundering Directive

Response by the Chartered Institute of Taxation

1 Introduction

1.1 The Chartered Institute of Taxation ('CIOT') comments on aspects of the HMT Consultation on the Transposition of the Fifth Money Laundering Directive (5MLD) published on 15 April 2019 ('the Consultation')[1]. 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.

This consultation invites views and evidence on the steps that the government proposes to take to meet the UK's obligation to transpose the directive into national law. It also seeks views and evidence on the potential costs and benefits of the changes considered. Where EU Member States are given the discretion to make decisions on certain aspects of 5MLD, the consultation seeks views on the government's proposals and issues to be addressed.

The objective of 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.

In relation to 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.

1.2 As an educational charity, our primary purpose is to promote education in taxation. We are also a supervisor of certain tax advising firms under AML legislation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/795670/20190415_Consultation_on_the_Transposition_of_5MLD__web.pdf

and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

1.3 Our stated objectives for the tax system are all pertinent to this consultation:

- A legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences.
- Greater simplicity and clarity, so people can understand how much tax they should be paying and why.
- Greater certainty, so businesses and individuals can plan ahead with confidence.
- A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).
- Responsive and competent tax administration, with a minimum of bureaucracy.

1.4 We have not addressed certain questions, so some chapters and questions are missing from the sequence reflected in the headings below.

2 Executive summary

2.1 The government proposes to expand the definition of 'tax adviser' in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 to include firms and sole practitioners who by way of business provide, directly or by way of arrangement with other persons, material aid, assistance or advice about the tax affairs of other persons. We think it unlikely that the proposal would greatly impact the position of our members or of firms in which they work.

2.2 Existing regulations adopt a risk based approach ('reasonable measures') to determining and verifying the law to which a body corporate is subject, its constitution and the full names of the board of directors and the senior persons responsible for the operations of the body corporate. The government proposes to mandate these requirements. Our preference is to retain the current risk-based approach, unless there are good reasons for change based on efficacy and proportionality, on the grounds that a mandated approach gives rise to a lack of clarity in the terms of what steps relevant persons were expected to take. There is a perception that much anti-money laundering legislation in this area reflects a 'box-ticking approach' which distracts from consideration of real risk. Changes of this nature, if avoidable, are unhelpful in combatting this perception.

2.3 In terms of an explicit customer due diligence requirement for relevant persons to understand the ownership and control structure of customers, we believe that most firms will seek to understand the ownership and control structure of customers. Having it as an explicit requirement could be disproportionately burdensome. For example, some large multinationals have complex structures with hundreds of companies in multiple jurisdictions. Not all jurisdictions have requirements to file individual corporate entity accounts and similar information. Tracing an ownership right through the corporate client may not be necessary where ultimate beneficial ownership is not in doubt**.**

2.4 We have some concerns in relation to 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. Our preference is that obliged entities assess this risk with perhaps an option to ask the client to update in the first instance in cases of mere oversight which may save administrative work; we appreciate that there is a risk of naivety but such discrepancies are not in reality

necessarily a cause for suspicion and naivety needs to be combatted in any event if the legislation is to be truly effective.

2.5 We note 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.

2.6 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 the Directive should be construed purposively.

2.7 As the Directive is aimed at registration of the beneficial ownership of 'entities', only where a UK trust may constitute an 'entity' comparable to a corporate, should it be fall to be registered.

2.8 UK law often employs a trust mechanism where the approach in most European jurisdictions would be contractual (and clearly fall outside of the scope of 5MLD). To appropriately reflect 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.

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

2.10 We are 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.

2.11 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.

3 Chapter 2 New obliged entities: Expanding the scope in relation to tax matters

Question 1 What additional activities should be caught within this amendment?

Question 2 In your view, what will be the impact of expanding the definition of tax advisor? Please justify your answer and specify, where possible, the costs and benefits of this change.

3.1 The government proposes to expand the definition of 'tax adviser' in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the Regulations) to include firms and sole practitioners who by way of business provide, directly or by way of arrangement with other persons, material aid, assistance or advice about the tax affairs of other persons.

3.2 We are not well placed to give informed comment on the likely impact of this extension, whether as to effective combatting of money laundering, or as to business costs and wider impact. We think it unlikely that it would greatly impact the position of our members or of firms in which they work.

4 Chapter 4 Customer due diligence: Electronic identification processes

4.1 **Question 44 Is there a need for additional clarification in the regulations as to what constitutes 'secure' electronic identification processes, or can additional details be set out in guidance?**

We are of the opinion that setting details out in guidance should suffice, and that this more readily allows future improvements in technology to be accommodated.

4.2 **Question 45 Do you agree that standards on an electronic identification process set out in Treasury-approved guidance would constitute implicit recognition, approval or acceptance by a national competent authority?**

In principle yes but please define national competent authority.

4.3 **Question 46 Is this change likely to encourage firms to make more use of electronic means of identification? If so, is this likely to lead to savings for financial institutions when compared to traditional customer onboarding? Are there any additional measures government could introduce to further encourage the use of electronic means of identification?**

It would be helpful if the government could confirm whether using a recognised electronic identification process will be sufficient for customer due diligence (CDD) purposes or whether additional checking would be required. If so, in what circumstances? This would then potentially encourage firms to make more use of electronic means of identification. In respect of whether it would lead to savings, costs of electronic identification providers can be an issue, especially for smaller firms who are not regular users and cannot benefit from the reduced charges for high volume users.

4.4 **Question 47 To what extent would removing 'reasonable measures' from regulation 28(3)(b) and (4)(c) be a substantial change? If so, would it create any risks or have significant unintended consequences?**

We are unclear as to the need for this change and feel that retaining 'reasonable measures' keeps it as best practice and within a risk based approach rather than a mandatory obligation that may be difficult to fulfil. It would also lead to a lack of clarity in the Regulations if 'reasonable measures' were removed because what would relevant persons be expected to do? How far would they be expected to go? It could also stall or defeat onboarding of perfectly 'innocent' and untroublesome clients. If this remained as risk based, the relevant persons would suffer the consequences if they did not complete adequate checking in any event. There is a perception that much anti-money laundering legislation in this area reflects a 'box-ticking approach' which distracts from consideration of real risk. Changes of this nature, if avoidable, are unhelpful in combatting this perception.

4.5 **Question 48 Do you have any views on extending CDD requirements to verify the identity of senior managing officials when the customer is a body corporate and the beneficial owner cannot be identified? What would be the impact of this additional requirement?**

As in 47 above, there needs to be some flexibility for where this is difficult to fulfil and a risk based approach should be followed.

4.6 **Question 49 Do related ML/TF risks justify introducing an explicit CDD requirement for relevant persons to understand the ownership and control structure of customers? To what extent do you already gather this information as part of CDD obligations?**

Most firms will seek to understand the ownership and control structure of customers but again having it as an explicit CDD requirement could be unduly burdensome. It could be a very time consuming task which may not

be necessary in all circumstances**.** For example, some large multinationals have complex structures with hundreds of companies in multiple jurisdictions. Not all jurisdictions have requirements to file individual corporate entity accounts and similar information. Tracing an ownership right through the corporate client may not be necessary where ultimate beneficial ownership is not in doubt.

4.7 **Question 50 Do respondents agree we should clarify that the requirements of regulation 31 extend to when the additional CDD measures in regulation 29 and the EDD (enhanced due diligence) measures in regulations 33-35 cannot be applied?**

Yes, as it is important that they are all treated consistently.

4.8 **Question 51 How do respondents believe extending regulation 31 to include when EDD measures cannot be applied could be reflected in the regulations?**

As stated above, it is important that they are consistent.

4.9 **Question 52 Do respondents agree the requirements of regulation 31 should not be extended to the EDD measures which already have their own 'in-built' follow up actions?**

Yes, agreed.

5 Chapter 5 Obliged entities: beneficial ownership requirements

5.1 **Question 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)?**

We largely agree with this approach (in relation to trusts see further at paragraph 19.1 below).

6 Chapter 6 Enhanced due diligence

6.1 **Question 56 Are there any key issues that the government should consider when defining what constitutes a business relationship or transaction involving a high-risk third country?**

What would the position be if a country were added to the high risk list while a supervised firm was acting for a client involving the newly appointed high risk country?

6.2 **Question 57 Are there any other views that the government should consider when transposing these Enhanced Due Diligence measures to ensure that they are proportionate and effective in combatting money laundering and terrorist financing?**

There is a risk that some firms would just not offer services where a high risk country may be involved – it is unlikely that that is precisely the desired outcome? Depending on how broadly 'involvement with' is defined it could be disproportionately restrictive.

6.3 **59 Do you agree that the UK functions identified in the FCA's existing guidance on PEPs, and restated above, are the UK functions that should be treated as prominent public functions?**

Yes, agreed. Should prominent ministers of religion be included? Maybe Heads (eg Archbishop/Chief Rabbi etc) instead of 'prominent' as such a definition might be less open to debate?

7 Chapter 8 Mechanisms to report discrepancies in beneficial ownership information

7.1 **Question 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?**

This is burdensome for obliged entities and could also potentially raise safety/anonymity issues as it could be obvious that the information has come from the obliged entity. Therefore, rather than being a requirement, it would be preferable to be on a best practice basis so that obliged entities could assess this risk. It could also be an option to ask the client to update in the first instance in cases of mere oversight which may save administrative work – we appreciate that there is a risk of naivety but such discrepancies are not in reality necessarily a cause for suspicion and naivety needs to be combatted in any event if the legislation is to be truly effective.

7.2 **Question 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?**

Please could competent authority be defined.

7.3 **Question 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?**

As indicated at Question 61 above, there could also be safety/anonymity issues as well as potential tipping off issues.

8 Chapter 9 Trust registration service

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.

8.1 We note that the government recognises that the transposition should balance 'the need for a proportionate approach which manages the burden on business, with the need for regulated businesses ('obliged entities') to actively discourage ML/TF activity' [the Consultation, 1.12], and 'will only 'gold plate' (go further than) the provisions in 5MLD where there is good evidence that a material ML/TF risk exists that must be addressed' [ibid. 1.13]. In the context of trusts, 'the government recognises that the NRA[2] 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 [ibid 9.6].' The latter is consistent with Recital (2) of the Directive which states that:

'*…In order to keep pace with evolving trends, further measures should be taken to ensure increased transparency of ...trusts and legal arrangements having a structure of functions similar to trusts ('similar legal arrangements'), with a view to improving the existing preventative framework and to more effectively countering terrorist financing. It is important to note that the measures taken should be proportionate to risk*.'

[2] National Risk Assessment

Although this appears to refer to all 'trusts' there is a question as to what that term means in the context of this Directive. See below.

8.2 As European legislation adopts a purposive, principles-based approach to legislative drafting, the recitals to the Directive provide the framework for determining the UK's overall approach to the definition of an express trust.

Recital (27) indicates that;

'Due to the wide range of types of trusts that currently exists in the Union, as well as an even greater variety of similar arrangements, the decision on whether or not a trust or a similar legal arrangement is comparably similar to corporate and other legal entities should be taken by Member States. The aim of the national law transposing those provisions should be to prevent the use of trusts or similar legal arrangements for the purposes of money laundering, terrorist financing or associated predicate offences.'

Note that this sentence explicitly envisages that each Member State needs to decide whether a trust or similar legal arrangement is 'similar to corporate and other legal entities'. The need for such a decision would not arise if anything called a 'trust' were required to be treated as an 'entity' in any case. We believe however that the point of this exercise is to look to the Member States to identify what is an 'entity' of the sort envisaged and what is not.

Recital (29) provides that in order to ensure legal certainty and a level playing field it is essential to clearly set out which legal arrangements should be considered similar to trusts by effect of their functions or structure. Therefore, each Member State is required to:

'*identify the trusts, if recognised by national law, and similar legal arrangements that may be set up pursuant to its national legal framework or custom and which have structure or functions similar to trusts, such as enabling a separation or disconnection between the legal and beneficial ownership of assets'*

Article 31.10 of 5MLD enshrines this requirement and sets out the timetable:

'*Member States shall notify to the Commission the categories, description of the characteristics, names and where applicable, legal basis of the trusts and similar arrangements* referred to in paragraph 1 by 10 July 2019. *The Commission shall publish the consolidated list of such trusts and similar arrangements in the Official Journal of the European Union by 10 September 2019.'*

The need for a reporting-back mechanism is completely consistent with the thought that the Member States have a substantive exercise to undertake in determining the scope of the Directive as it applies to trust and trust-like entities.

8.3 The background to the 5MLD is set out in the EC Impact Assessment dated 5 July 2016[3] which looked at deficiencies in the 4MLD regime, and proposals to remedy them (which in due course led to the enactment of 5MLD). The objective [at Part II, 5.3.1.2 (ii)] is to remedy inconsistencies in national registration and reporting requirements '*to ensure that all trusts that are operating in the EU are properly monitored and registered in the EU*'. We note the implicit assumption underlying that document: that a trust is a properly constituted entity (the rationale for inclusion of all express trusts), and that there was no intention in relation to trusts to extend the scope of registration beyond that required to remedy the deficiencies identified above.

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=SWD:2016:223:FIN&from=EN

8.4 Recital (27) recognises that:

Rules that apply to trusts and similar legal arrangements with respect to access to information relating to their beneficial ownership should be comparable to the corresponding rules that apply to corporate and other legal entities. Due to the wide range of types of trusts that currently exists in the Union, as well as an even greater variety of similar legal arrangements, the decision on whether or not a trust or a similar legal arrangement is comparably similar to corporate and other legal entities should be taken by Member States. Again, the recital is quite explicit that the issue to be addressed is whether a trust or similar arrangement is comparably similar to corporate and other entities.

The recital indicates therefore that only where a trust is 'comparably similar to a corporate or other legal entity' is it intended to be brought into the scope of the Directive. The emphasis is on there being an 'entity'- a structure which has a wider rationale or purpose. In terms of English law, a trust where trustees expressly hold property on a terms of a discretionary trust or on a life interest basis would clearly have such wider characteristics. By contrast, the English law mechanism whereby a trust is used to hold property on behalf of joint owners *simpliciter* would not appear to lie within the contemplation of the Directive. There is no lack of clarity as to who is the ultimate owner and no ability (whether exercised benignly or abusively) to alter the split of effective benefits derived from assets held in the trust to different beneficial interests, whether as to capital and income, or as to various tranches of capital and income, or as between different periods of time (rather as a company can pay dividends differently to different classes of shareholder and at different times).

8.5 In broad terms, the European understanding of a trust is not dissimilar to the 'wider' trust characteristics set out above: a structure or 'entity' with multiple beneficiaries which is either discretionary or confers successive interests. In UK tax terms this approach is currently recognised both in the IHT definition of settlement (Inheritance Tax Act 1984, section 43) and the Capital Gains Tax and Income Tax definitions of settled property (Taxation of Capital Gains Act 1992, section 68 and Income Tax Act 2007, section 466). Under these definitions, settled property is defined as any 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. It seems clear that the key underlying reason for the approach taken in these definitions – that the alterations of the splits of effective benefits referred to in the preceding paragraph can be used to fiscal advantage, in a way that is not possible where a beneficiary is absolutely entitled under the trust – is entirely consistent with the concern of the Directive – that such alterations can be used to obscure ultimate effective ownership and control. It would seem entirely appropriate for this definition to inform the UK's approach to an express trust for the purposes of implementing 5AML.

8.6 Recital (28) develops the understanding that a Member State may at its discretion in response to changing money laundering and terrorist financing risks, and outside of the mandatory requirements for trusts which are comparably similar to corporate and other legal entities, set up a transparency regime for such other '*trusts and similar legal arrangements that are not comparable to corporate and other legal entities'.* That approach is mirrored in Recital (29): '*Where the characteristics of the trust or similar legal arrangement are comparable in structure or functions to the characteristics of corporate and other legal entities ...'*

It seems clear that in the UK context this would refer to express trusts where a beneficiary (or beneficiaries in predetermined proportions or degrees) have absolute beneficial entitlement to the trust property.

To comply with the scheme envisaged by the Directive, the UK ought to be positively considering whether, and if so which, additional requirements should be imposed on such arrangements in order to respond to changing money laundering and terrorist financing risks. (Although we have not considered in detail what might be required as a result of this exercise, a possible example of such an additional arrangement is given

in the last sentence of para 10.2 below.) If the UK fails to make such a positive determination, it will be falling short of the action required. While this may not be an express legal obligation, it is a commitment made in the context of the international effort being made to combat money laundering. Nor would it be right to say that by simply rolling out the requirements applying to trust-like entities, the UK is acting 'on the safe side'. That would be simply 'gold-plating' and not the 'level playing field' approach of the Directive. Quite apart from the costs and risks that this would impose on legitimate interests, it is not to be assumed that requirements conceived of as applying appropriately to entities 'comparable to corporate and other legal entities' would necessarily be the most sensible and effective requirements into which totally different types of arrangements have to be shoe-horned.

8.7 The opening to Recital (29) states: *In order to ensure legal certainty and a level playing field, it is essential to clearly set out which legal arrangements established across the Union should be considered similar to trusts by effect of their functions or structure. Therefore, each Member State should be required to identify the trusts, if recognised by national law, and similar legal arrangements that may be set up pursuant to its national legal framework or custom and which have structure or functions similar to trusts, such as enabling a separation or disconnection between the legal and the beneficial ownership of assets.*

In relation to the final phrase, we would observe that the separation of the legal and beneficial ownership within a UK trust is merely one of its characteristics; and that those terms in the Recital are merely indicative (and not conclusive) of '*similar legal arrangements*' … which may have a '*structure or functions similar to trusts*'.

8.8 Under Article 31.1 of 5MLD each member state must identify and notify arrangements that it believes to have 'a structure or functions similar to trusts'. However, in applying those criteria it is necessary to follow the underlying rationale for the Directive: '*Rules that apply to trusts and similar legal arrangements …. should be comparable to the corresponding rules that apply to corporate and other legal entities*' [Recital (27)]. It appears to follow that the trust rules should not embrace more than a comparable corporate entity.

8.9 For the reasons given above, we do not believe that UK bare trust and nominee arrangements fall within the scope of the Directive, not least because of the requirement for 'a level playing field' across the member states. We understand that in many civil law jurisdictions, such equivalent arrangements would be structured on a contractual basis. The rationale for such arrangements to be subject to registration is not the same as for an entity which is trust-like or corporate-like (terms that, instructively, seem to be used interchangeably in the Directive).

8.10 A bare trust under which property is held for a minor who becomes absolutely entitled at age 18 would not, on the analysis above, fall within the Directive, as the 'entity' concept is absent; the 'trust' here is simply the mechanism which English law uses to enable property to be held for a minor who is not legally competent. It is understood that the government has already recognised this position in relation to a bank account held by a parent for a child. However, we find it difficult to ascertain why, in principle, that approach should not extend to any situation where property is held for a minor. Similarly, the approach to pooled assets (such a solicitor's Client account or wealth managers' custodianship arrangements for shares) set out in chapter 13 of the Consultation, would appear to support the proposition that a bare trust, despite the separation of legal and beneficial ownership, lies outside of the intention and scope of the Directive. What is the legal basis for the government's proposals in respect of bank accounts or pooled assets, unless on the above analysis?

8.11 A similar 'entity' argument applies in relation to nomineeships. There is also the very practical problem of how enforcement of the regulations could realistically be achieved in relation to nomineeships. We observe that generally under the UK tax system, as the nominee is ignored and the true beneficial owner of the

property remains the taxable person, there appears little risk of abuse as regards taxation. As regards money laundering, the exercise envisaged by Recital 28 and referred to at paragraph 8.6 above would seem to be the appropriate way of addressing that question, within the scheme created by the Directive.

8.12 The requirement to identify is particularly relevant in the context of bare trusts and nominee arrangements. As the decision is delegated to the individual state, there is the clear risk of inconsistency in that other countries which have effectively equivalent arrangements but based on contractual rather trust principles, may not so notify.

To take one, purely hypothetical, example: it is for Germany to determine which aspects of Treuhand do not have trust characteristics. Were Germany to decide that a Treuhand providing pure nomineeship was not registrable (but the UK had decided that pure nomineeship was registrable), this would be contrary to the 'level playing field' envisaged in Recital (29).

We recommend that the government liaise swiftly and in detail with other EU states before the Article 31.10 deadline of 10 July 2019 expires to ensure that that only arrangements that have equivalent substantive effect within each EU state are notified in compliance with the Directive. Without such liaison there is a clear practical risk of inconsistent interpretation by different EU state with adverse consequences not only for commercial fairness, but also eroding AML efficacy if international criminals were able to exploit inconsistencies of approach between Member States.

8.13 In passing, we note that paragraph 9.10 of the Consultation states that an 'express trust is generally defined as one that was expressly (ie deliberately) created by a settlor, as opposed to being created …. by statute.' It would seem anomalous that a statutory trust for a minor arising on intestacy under the Administration of Estates Act 1925 would not require registration, whereas a trust 'expressly' created by a settlor on similar terms would not. Looking at this question, as the scheme of the Directive requires, in the light of a comparison with corporate entities, should the Chartered Institute of Taxation, as a body incorporated by Royal Charter, escape transparency requirements imposed on the generality of companies? Would that make any sense? When viewed from a purposive rather than a forensically over-literal perspective the 'statutory' trust in these circumstances strengthens the case for the similar exclusion of a bare trust.

9 Chapter 9 Trust registration service

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.

9.1 We recognise that the Scottish law of trusts differs from that of England and Wales Therefore the exercise required by the Directive to decide whether a trust or similar legal arrangement is 'similar to corporate and other legal entities' needs to be undertaken by reference also to the Scottish law.

10 Chapter 9 Trust registration service

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?

10.1 In principle, for coherence, simplicity and ease of practical compliance, it seems sensible to align the registration requirements for non-EU resident trusts acquiring UK land with existing land registration requirements

10.2 We note, as does paragraph 12.6 of the Consultation, the introduction of the draft Registration of Overseas Entities Bill[4] as an example of the leading role being taken by the UK in respect of improving transparency in the property market. First published in July 2018, the Bill establishes a beneficial ownership register of overseas entities that own property in the UK. Details of those who 'own and control' any entity that owns land in the UK would be kept at Companies House and would be open to the public in the same way as current Companies House records. Under the current wording of the Bill, the word 'entity' includes corporate bodies, partnerships, and 'any other entity that (in each case) is a legal person under the law by which it is governed' [s2(2)]. The requirement to register will be enforced via a restriction on the Land Registry unless the overseas entity has valid registration number, and through fines.

We recommend the TRS and this new Companies House/Land Register be aligned to avoid the need for duplicate registrations. A wider question is whether the Land Registry itself should record details of all beneficial ownership behind properties.

11 Chapter 9 Trust registration service

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?

11.1 It is clear that the registration requirements in Article 31.3a apply only to trusts within Article 31.1, ie those trusts which are administered in the Member State. If the trust is not 'administered' in the Member State, the trust cannot be required to be registered, even though it may receive the services of a UK obliged entity.

11.2 We note that the government's intention at 9.19 of the Consultation is that, for this purpose only, that an otherwise non-EU resident express trust will be deemed to be administered in the UK by virtue of having one UK trustee, even if there is a non-UK settlor and there is no other connection with the UK.

12 Chapter 9 Trust registration service

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

12.1 The government's proposal to define 'an element of duration' to encompass working interactions of 12 months or more appears to be a sensible safeguard to the inadvertent triggering of a registration requirement.

12.2 However, we suggest that there may be practical difficulties in establishing when a business relationship ends and re-commences or merely continues but with periods of inactivity and, to what extent the interaction is (on the one hand) a protracted but essentially transactional relationship or (on the other hand) a business

4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727915/Draft_Registration_of_Overseas_Entities.pdf

relationship with the requisite element of duration. (See paras 68- 72 of the Upper Tribunal decision in *Online Tax Rebate Limited v HMRC* [2019] UKUT 0167 (TCC)[5])

13 Chapter 9 Trust registration service

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.

13.1 In view of the NRA's conclusion that UK trusts present a low risk of money laundering and terrorist financing, prima facie there does not appear to be a case for imposing additional burdens requiring the collection of further information.

14 Chapter 9 Trust registration service

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.

14.1 The experience of the introduction of the TRS has shown how time-consuming and therefore costly it is to collate the requisite information. Moreover, that TRS experience related to trusts which were already subject to a degree of compliance through having a tax consequence. Extending registration to all express trusts, including those which may be regarded as dormant (eg trusts of life insurance policies; land which is not actively managed) will involve a very extensive exercise affecting a wide category of trustees who may be unaware of their status in relation to such trusts. The impact on the effective operation of the TRS of imposing requirements appropriate to 'entities' on an unnecessarily wide population of trusts with different characteristics reinforces the argument of paragraphs 8.6 and 8.12 above that such 'gold plating' is not consistent with effective anti-money laundering.

14.2 Duplication of the requirement to provide information that is an existing part of a regulatory regime in specific sectors such as charities and pensions should be, as far as possible, avoided.

14.3 Publicity on the introduction of the TRS was minimal. Expansion of the registration requirement to a wider (and even less aware) cohort of trustees must be accompanied by extensive and early communication.

14.4 Introducing the TRS on an 'iterative' basis proved difficult in practice, with much professional (and no doubt also lay) time being wasted as the registration requirements changed. It is understood that a new system is to be introduced. We hope that it be fully developed and tested before it is rolled out and functions effectively for both lay trustees and agents. .

14.5 We welcome the government's intention to review and ideally reduce the current information requirement for trusts with tax consequences, in the light of the findings that it has been onerous.

[5] https://www.gov.uk/tax-and-chancery-tribunal-decisions/online-tax-rebate-ltd-v-the-commissioners-for-hm-revenue-and-customs-2019-ukut-0167-tcc

15 Chapter 9 Trust registration service

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?

15.1 We note that the government may 'choose' to collect this additional information. We consider the requirement for additional information should be governed by the underlying purpose of the Directive and therefore the question is whether it is proportionate to do so. It is not clear from the consultation document why this additional information might be required. We note that this issue will form part of the technical consultation.

15.2 The existing TRS regulations cause some difficulties, and potential conflicts, in cases where beneficiaries need to be identified with NINO etc. even though they are not due to receive anything now, or potentially ever. They may be default beneficiaries, in certain circumstances, or those who would be benefit but for example the trust does not have funds until the death of a life assured. This can create additional work, cost and conflict about when and how benefits will be received. This could become more significant the wider the range of trusts now required to register.

16 Chapter 9 Trust registration service

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.

16.1 It seems sensible to have an extended lead-in time, as suggested. Even so, we reiterate the need for extensive publicity to ensure compliance.

17 Chapter 9 Trust registration service

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.

17.1 There may be good personal reasons for a trust to be established quickly (for example, the prospect of imminent loss of capacity or death). But although the formalities to declare the trust may have been completed rapidly, to collate details of all the beneficiaries may take considerably longer than 30 days. We suggest 6 months as a more appropriate period.

17.2 A crucial issue will be the date on which a trust is treated as being "created". For the trust created by a deceased's will or intestacy, it should not be the date of death of the deceased, as the trust assets are not normally ascertained until a long time after that date. If it were a trust created by a deed of variation, the date of the deed would also present problems, would be premature in most cases. In either case, we suggest it should be the date the trust is brought into operation, by a transfer of assets to the trustees, which is more logical and workable in practice. That will then affect the time requirement, as in 17.1 above, but in any event 30 days is too short and 6 months would be more manageable in practice.

18 Chapter 9 Trust registration service

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?

18.1 In our view, the current tax-geared penalty regime for TRS non-compliance may not be appropriate and proportionate in all cases for the new regime We welcome a more detailed consultation by HMRC will be published later this year on penalties.

18.2 In terms of a replacement regime, and pending the detailed consultation, we largely agree with the broad principles for a good penalty regime set out by HMRC in recent consultation documents[6] such that it should be:

- Fair (and therefore proportionate)
- Effective in supporting good compliance
- Simple to understand and operate

The need for adequate safeguards is intrinsic to these principles, such a transparent appeals process and a recognition of genuine error or oversight in terms of a reasonable excuse or reasonable steps to comply that nullifies a penalty.

Given that a new regime will embrace a wider cohort of trustees, the importance of good communication in advance of implementation is essential. HMRC will need to explain how it works clearly in order that trustees understand what they need to do to minimise their exposure to penalties and the consequences of not meeting their registration obligations.

19 Chapter 9 Trust registration service

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.

19.1 We believe that the government's suggested approach of placing the onus on the trustee to provide the obliged entity with the information and proof of the trust's registration is the preferred option (in contrast to the alternative of the obliged entity itself requesting the information directly from the trust register) provided that clear guidance is available on what is required to be provided by trustees to an obliged entity to meet their obligations. As the consultation recognises the ability of trustees to easily access proof of registration from the register in a secure and verifiable way will be essential We note that the methodology will be the subject of the technical consultation.

[6] https://www.gov.uk/government/consultations/hmrc-penalties-a-discussion-document
https://www.gov.uk/government/consultations/making-tax-digital-sanctions-for-late-submission-and-late-payment
1. The penalty regime should be designed from the customer perspective, primarily to encourage compliance and prevent non-compliance. Penalties are not to be applied with the objective of raising revenues.
2. Penalties should be proportionate to the offence and may take into account past behaviour.
3. Penalties must be applied fairly, ensuring that compliant customers are (and are seen to be) in a better position than the non-compliant.
4. Penalties must provide a credible threat. If there is a penalty, we must have the operational capability and capacity to raise it accurately, and if we raise it, we must be able to collect it in a cost-efficient manner.
5. Customers should see a consistent and standardised approach. Variations will be those necessary to take into account customer behaviours and particular taxes.

20 Chapter 9 Trust registration service

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?

20.1 We note that the government recognises the risks of sharing trustees' and individuals' personal data [Consultation 9.43]. In addition, we are concerned that the General Data Protection Regulation may be breached by the terms of 5MLD itself. Article 5 of the GDPR provides that 'Personal data shall be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes'. Beneficial owner information is required, under 5MLD, to prevent money laundering and terrorist financing. Given the scope for public access, it appears that the data controller (the body which maintains the register) may be unable guarantee to the 'data subjects' that that the information will be used exclusively for those purposes. At the very least, stringent safeguards should be included.

20.2 At Consultation paragraph 9.45 the government has set out criteria which aim to ward off speculative applications, and at 9.46 the commitment to 'set up a clear and robust system to ensure that data is only released when we are confident that a request meets the definition [of 'legitimate interest'] in full'.

20.3 We believe that, to protect both trustees and beneficiaries from unwarranted invasion of their privacy, the question is not whether, and in what circumstances an enquirer (eg a journalist) might have a legitimate interest, but rather how it is determined whether an interest is legitimate. To address this point we suggest that there be an independent arbiter or ombudsman and that the trustee should have the right to be heard. It might then be possible to codify more detailed (but evidence-based) rules in the light of the experience of the ombudsman's determinations and of any disputed cases.

20.4 In relation to requests for information on trusts holding non-EAA companies (which are the subject of the detailed questions Q77 to Q81) we note that 5MLD postulates that the request be made in respect of a particular trust or company. It would seem therefore that the person making the request must therefore be able at least to identify the trust which is the object of the enquiry.

21 Chapter 9 Trust registration service

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.

21.1 The definitions appear to cover most circumstances.

22 Question 78 Do you have any views on possible definitions of 'other legal entity'? Should this be defined in legislation?

22.1 In order to ensure the rules in this area are implemented uniformly and effectively across all member states, it is important that this concept is clearly defined in legislation.

22.2 **Chapter 11 Requirement to publish an annual report**

Question 88 Do you think it would still be useful for the Treasury to continue to publish its annual overarching report of the supervisory regime as required by regulation 51 (3)?

It is useful to have the information on all supervisors in one place.

23 Chapter 14 Additional technical amendments to the MLRs

23.1 **Question 96 Do you agree with our proposed changes to information-sharing powers of regulations 51, 52?**

Yes, agreed.

23.2 **Question 97 Do you have any views on this proposed new requirement to cooperate?**

As it stands, the proposal is too broad to comment on. Further information is required as to how the process would work and what OPBAS has in mind.

23.3 **Question 98 Do you agree with our proposed changes to regulations 56?**

Accountancy Service Providers do not appear to be covered in Reg 56; please could you clarify.

24 Acknowledgement of submission

24.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

25 The Chartered Institute of Taxation

25.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 19,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
10 June 2019