

Analysis

5MLD: major changes to the UK trust register

Speed read

The EU's Fifth Money Laundering Directive requires significant changes to trust registers of all EU member states, including the UK's. In particular, all UK trusts will have to register whether or not they have tax liabilities; trusts which are already registered will have to provide some additional information about their beneficial owners; and, subject to safeguards, third parties will be able to access information on the register. Whilst trustees need not register or provide additional information until 10 March 2022 at the earliest, it would be advisable for trustees to start considering a number of practical issues and to begin populating an internal register with the information that will be needed.



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The UK trust register ('the register') has been in existence since 2017. The register has a dual purpose:

1. it is the way trusts which are liable to UK income tax or capital gains tax must register with HMRC; and
2. it fulfils the UK's obligation under the EU's Fourth Money Laundering Directive to maintain a central register of the beneficial ownership of tax paying trusts.

All UK express trusts which have a liability to pay any of the relevant UK taxes (income tax, capital gains tax, inheritance tax, SDLT (or the Scottish equivalent) or stamp duty reserve tax) are liable to register. All non-UK express trusts which incur a liability to pay any of the relevant UK taxes in relation to only the UK source income or UK assets held directly by the trust and not through an underlying

company are also liable to register.

Currently, the register is not public and the information on the register is only available to government authorities.

What is changing?

The UK has now implemented the EU's Fifth Money Laundering Directive (EU) 2018/843 (5MLD): the final regulations (SI 2020/991) were laid before Parliament on 15 September 2020 and took effect on 6 October 2020. This requires significant changes to the register (and to the trust registers of all EU member states). The main changes are as follows.

1. All UK trusts will have to register whether or not they have tax liabilities.
2. Those trusts which are already registered will have to provide some additional information about their beneficial owners.
3. Non-EEA Trusts will be required to register if they enter into a business relationship with a UK service provider or acquire UK real estate.
4. Third parties will be able to access information on the register.
5. Trustees will be required to supply the trust's registered beneficial ownership information to any service provider with which they enter into a business relationship. Service providers will have to report any discrepancy between the information on the register and the information obtained as part of their due diligence obligations.
6. Trustees will have only 30 days from the creation of a trust or from the date of any changes to the beneficial owners of the trust to report the relevant information.

These changes will create significant additional compliance obligations for many trustees. Many non-professional or overseas trustees are likely to be unaware of their obligations.

Which trusts have to register?

UK trusts

In principle, all UK trusts will have to register. However, the following categories of trust are excluded from registration:

- trusts which come into existence by operation of law: this would include, for example, trusts arising on intestacy, implied or constructive trusts and trusts created under a court order such as on divorce;
- trusts relating to joint ownership of property (for example, land or bank accounts) where the legal and beneficial owners are the same;
- charitable trusts registered as charities in Scotland, Northern Ireland or England and Wales; or which are exempt and excepted from registration by the relevant statute (for example, because their income is below the registration threshold);
- trusts holding assets of a pension scheme which is a registered pension scheme;
- trusts holding life policies which only pay out on death, terminal or critical illness or permanent disability of the person assured;
- trusts arising on death under a person's will unless it is in existence for more than two years after the death of the individual;
- pilot trusts which hold no more than £100 and which are in existence before 6 October 2020;
- trusts which are required to meet statutory conditions in order to benefit from some beneficial status (for example, trusts for vulnerable beneficiaries or employee trusts); and
- certain commercial trusts (for example, relating to bond issues or syndicated loans).

The underlying principles behind the exemptions are that either the information is already available as the trusts are required to register in some other way (for example pensions and charities) or that there is a low risk of the trusts being used for money laundering or terrorist financing purposes (such as trusts involving joint ownership or those which are required to meet specified statutory conditions).

It had been hoped that nominee/bare trust situations would be exempted from the requirement to register. However, there is no general exemption for such arrangements, and so nominee arrangements and bare trusts will be required to register, subject to the exemptions set out above.

HMRC will, in due course, provide further guidance in relation to those trusts which may be exempt from registration.

Note that, given the dual purpose of the register, a trust which has UK tax liabilities will still have to register, even if it falls within one of the exempt categories.

Non-UK/EEA trusts

Taxable trusts

Non-UK/EEA trusts which own UK assets or receive UK source income at trust level and have UK tax liabilities will continue to be required to register. This may, for example, be the case if the trustees hold UK assets which generate UK source income or which give rise to inheritance tax liabilities, but would not be the case if the trustees have a liability to UK inheritance tax by virtue of owning shares in a non-UK company which derive their value from UK residential property (since there, while the trustees may have a UK tax liability, they do not own any UK asset or receive any UK source income).

Trusts which engage UK service providers

A non-EEA trust which has at least one UK trustee (but otherwise no other connection with the UK) may be required to appear on the register if it enters into a business relationship with a UK service provider which is within the scope of the UK money laundering rules. This would include, for example: banks, investment managers, lawyers, accountants, tax advisers, trust and company service providers and property agents.

A trust which has at least one UK resident trustee will still be non-UK resident for tax purposes if there is at least one non-UK resident trustee and the settlor was neither resident nor domiciled in the UK when funds were contributed to the trust.

A business relationship involves some element of duration. HMRC's guidance is that this would normally involve an ongoing relationship which lasts for more than 12 months. The engagement of an estate agent or an auction house to sell that trust asset would not, on this basis, constitute a business relationship. However, the courts have interpreted the definition of business relationship more widely, and some caution should be exercised in relying on HMRC's guidance on this point.

This registration requirement applies only to business relationships entered into from 6 October 2020 when the regulations came into force.

Trusts which acquire UK real estate

A non-UK resident trust which has at least one UK trustee will be required to register if it acquires real estate in the UK.

Although it is not required by 5MLD, the UK government has decided that a non-UK resident trust which has no UK resident trustees will also be required to register if it acquires an interest in UK real estate. However, where there is no UK trustee, the information on the register will not be publicly available.

The requirement for a non-UK trust to register if it acquires real estate in the UK only applies where the trustees are registered at the Land Registry as the legal owners of the real estate. There is no requirement to register if the legal title is held by a nominee for the trustees. However, in these circumstances, it is likely that the nominee will need to register.

In practice, it is likely that trustees who acquire UK real estate will, at some point, be subject to UK tax and will therefore become subject to the normal rules for registration.

If a non-UK trust already holds real estate and has not been required to register as a result of any current UK tax liabilities, it appears that there will be no requirement to register as a result of the introduction of the new rules. On the face of it, the registration requirement only comes into play if the trust acquires real estate on or after 6 October 2020.

It should be emphasised that this is separate to the requirement (which will be introduced next year) for overseas entities to register with the Land Registry before they can acquire UK real estate. This may mean that a non-UK/EU trust with a corporate trustee which acquires UK real estate may have to register both at the Land Registry and on the register. The Land Registry will require information about the beneficial ownership of the trust company. The register requires information about the beneficial ownership of the trust.

The requirement for overseas trusts to register only applies if it is the trustees who acquire the UK real estate or enter into the business relationship. If the trustees own a company which acquires UK real estate or which enters into a business relationship, no registration would be necessary.

It should not be forgotten that acquiring real estate or entering into a business relationship in any EU member state is likely to result in a requirement to register on the trust register in that state. These rules do not only apply in the UK.

Trusts will only have to appear on one trust register. So, if overseas trustees acquire UK/EU real estate in more than one jurisdiction or enter into a business relationship with service providers both in the UK and in an EU member state before they are required to register, there may be a choice of jurisdiction in which to register.

What information must be provided?

Trusts which have UK tax liabilities

Given the dual nature of the register, trusts which have UK tax liabilities are required to provide more information including:

- the name and date of the trust;
- information about the trust assets, including their value;
- the place where the trust is resident/administered; and
- identity information in respect of each of the beneficial owners of the trust together with details of the nature and extent of their beneficial ownership.

The beneficial owners include the settlor, the trustees, the beneficiaries and anybody who holds certain powers in relation to the trust including power to amend the trust, to make distributions or to change the trustees and anybody who is required to consent to the exercise of any of these

powers. It would therefore normally include a protector. It also includes anybody named in a letter of wishes as a potential beneficiary.

HMRC accepts, however, that a contingent beneficiary does not have to be named on the register until the contingency is satisfied. In addition, members of a class of beneficiaries who are not specifically named do not have to be identified on the register unless they receive a benefit from the trust.

Trusts which do not have UK tax liabilities

Trusts which are not UK taxpayers only have to provide information about the beneficial owners of the trust and do not, for example, have to provide information about the trust assets.

Information about companies controlled by the trust

If a trust which is required to register:

- because it is a UK trust; or
- as a result of having at least one UK resident trustee and either:
 - entering into a business relationship with a UK service provider; or
 - acquiring UK real estate,

holds a controlling interest (more than 50%) in a non-EEA company, this fact, together with the name, place of incorporation and registered office of the company also must appear on the register. As explained below, this also has an impact on the circumstances in which information about the trust is available to third parties. This specific requirement does not apply to trusts with no UK resident trustee that acquire UK real estate, nor to non-UK trusts (whether or not there is a UK resident trustee) which are only required to register as a result of having a UK tax liability.

When does information have to be provided?

Trusts which are already registered will have to provide additional beneficial ownership information as well as information about any controlling interest in a non-EEA company. This must be done by 10 March 2022.

Trusts which are not already on the register will have to be registered by 10 March 2022 or within 30 days of the creation of the trust or satisfying the conditions for registration (such as entering into a UK business relationship), if later.

If any of the registered information changes (for example there is a change of trustees), the register must be updated within 30 days of the change.

The updated registration service is not, however, due to be available until sometime in 2021, so nothing can be done until then.

In the meantime, new trusts that are required to register because they have UK tax liabilities should comply with the existing timescales. This means registration by 5 October after the end of the relevant tax year if the trust is liable to income tax and/or capital gains tax or otherwise by 31 January after the end of the tax year in which a tax liability arises.

Once registered, information will remain on the register for six to ten years after the trust is terminated or the information becomes obsolete (for example information about a previous trustee or a former beneficiary where the trustee has been replaced or the beneficiary is no longer able to benefit).

The information which must be registered is likely to be the information which is current at the time registration

takes place. It is, though, not clear whether this means that a trust which no longer exists on 10 March 2022 will not be required to register.

Who can access the information on the register?

Customer due diligence

If the trust enters into a business relationship with a service provider which is within the scope of the UK's money laundering legislation, the trustee will be required to provide that person with the beneficial ownership information relating to the trust which is contained in the trust register.

The service provider is still required to collect its own due diligence information in the normal way. If there is any discrepancy between this due diligence information and the information contained on the register, the service provider will be required to report this to HMRC.

Third parties with a legitimate interest

In general, a third party will only be able to access the beneficial ownership information in respect of a trust if they have a legitimate interest in doing so.

This means that they will have to identify a specific trust, explain why they think that the trust has been used for money laundering or terrorist financing, identify the specific instance of suspected money laundering or terrorist financing and explain how the information will assist in the detection or prevention of money laundering or terrorist financing. There will however be no requirement that the trustees or beneficial owners are notified of any request for disclosure and they will have no right to appeal against any decision that disclosure should be given.

These requirements mean that there is quite a high hurdle for anybody to meet before the information can be accessed. This is required in order to provide an appropriate balance between combatting money laundering/terrorist financing on the one hand and individual's right to privacy on the other.

It should be noted that third parties will have no ability to access information about a trust if the only reason the trust is registered is because it has acquired UK real estate and the trust has no UK resident trustees. In addition, a third party cannot access beneficial ownership information in relation to a non-UK trust if the only reason that trust is registered is because it has UK tax liabilities. In practice, this means that the only circumstances in which information about a non-UK trust will be available to the public is where the trust has at least one UK resident trustee and has either engaged a UK service provider or has acquired UK real estate after the regulations come into force.

Trusts with controlling interests in non-EEA companies

Where the trust has a controlling interest in a non-EEA company, the ability of a third party to access information is wider as there is no requirement for the third party to show that they have a legitimate interest in obtaining the information.

However, the right to access the information is not completely unfettered. The person seeking the information will have to identify the specific non-EEA company in question and its relationship with the trust which holds the controlling interest. In addition, the person will have to demonstrate that the request is in line with the objectives of the directive, i.e. that it is in some way connected with the detection or prevention of money laundering or terrorist financing. Idle curiosity will not be sufficient.

As with the legitimate interest test above, third parties also cannot access information about a non-UK resident trust with a controlling stake in a non-EEA entity if the only reason the trust is registered is because:

- it has acquired UK real estate and the trust has no UK resident trustees; or
- it has UK tax liabilities.

Safeguards and appeals

Information will not be provided if there is a disproportionate risk of harm to the beneficial owner in question.

Information will also generally not be provided where the beneficial owner is a minor or is incapacitated.

It is intended that there should be a mechanism for appealing against a decision to withhold beneficial ownership information. No information is, however, yet available as to how any system of appeals will work.

Penalties

There will be penalties payable where trustees fail to register or fail to update the information on the register.

However, the rules will be relatively lenient where the failure is inadvertent. There will be no penalty for the first failure. Instead, HMRC will simply write to the trustees to remind them of their obligations. There is a penalty of £100 for each subsequent failure.

There will be more significant financial penalties for deliberate failures. However, no details have yet been provided of the amount of such penalties.

What should trustees be doing?

There is no urgency to take any immediate action given that the earliest date for trusts which are already registered to provide additional information and for trusts which are not yet registered to become registered is 10 March 2022. This is especially so due to the fact that the upgraded trust registration system will, in any event, only become available during the course of 2021 and therefore trustees cannot

get ahead of the game by starting to register now even if they wanted to do so.

Having said that, it is worth starting to think about the following points.

- If the trust is already registered, do the trustees already have the required additional beneficial ownership information or does this need to be obtained from the settlor/beneficiaries/protector?
 - If a trust is not already registered, will it be required to register or does it fall within the exemptions?
 - If it is required to register, does the trustee have the required information?
- In other words, it would be advisable to start populating an internal register with the information which will be needed in due course, in the format in which HMRC will demand it.
- If overseas trustees are considering acquiring UK land, should this be held directly or through an underlying company?
 - If overseas trustees are considering entering into a business relationship with a UK service provider, what is the best way of doing this?
 - Can the trustees make a case that any of the beneficial owners would be subject to a disproportionate risk of harm if information were made available to third parties or are there any beneficial owners who are minors or incapacitated?
 - If overseas trustees own real estate or have engaged service providers in more than one EU member state and/or the UK, where should they register? As long as they are registered in at least one EU member state (or the UK), there is no need to register anywhere else.

The changes introduced by 5MLD will have a significant impact on the trustees of all trusts which have connections with an EU member state or with the UK. Given the existence of exchange of information arrangements, such as the common reporting standard and FATCA, trustees may wonder why there is a need for central registers of beneficial ownership information about trusts, still less, why the information on those registers should be available to third parties. However, for better or worse, the transparency bandwagon continues to gain momentum. ■