

Transparency v. privacy



At our recent Global Issues focus group meeting, the Government's current consultation on the transposition of EU Anti-Money Laundering Directive V into UK law was discussed. This fifth iteration of legislation expands upon the scope of 4MLD, which has been effective since July 2018, bringing in types of trust commonly used for different types of share plan. HM Treasury are accepting consultation responses until 10 June 2019. A more technical consultation via HMRC is then expected to follow, but no dates have yet been confirmed.

Timing & Brexit

The UK Government is obliged to transpose 5MLD into UK law by 10 January 2020, if the UK either leaves on the basis of the Withdrawal Agreement (because this includes a transition period), or revokes Article 50 and remains in the EU. Only with a no-deal Brexit prior to that deadline can the UK legally justify not bringing this legislation into UK law.

One of the most salient points brought up by a focus group attendee was how the significantly increased disclosure and access requirements in this legislation would be expected to dovetail with another piece of EU legislation, the General Data Protection Regulation, which enshrines data subjects' rights to privacy in law.

It struck me then that this is an important intersection between rights to privacy and requirements for greater transparency. How do we reconcile those seemingly conflicting issues appropriately, whilst remaining on the right side of the argument?

Let us bear in mind that the purpose of this legislation is to prevent money laundering, terrorist financing and with it, prevent serious organised crime. To be effective, the legislation needs to be robust, proportionate and responsive to emerging threats.

Areas of increased scope

There are several areas of increased scope, including letting agents, crypto-assets, art dealerships, pre-payment cards, and the Euro10k threshold. There are several areas of changed process too,

around customer due diligence, identification & verification of senior management figures at corporate bodies, and greater responsibility for checking the ownership and control of entities. Enhanced due diligence processes will apply not just to individuals from high-risk third countries but business relationships and transactions involving those countries, and including the source of funds and wealth of customers and beneficial owners.

The UK government in the consultation document expresses concern that the definition of 'involvement' may be too broadly drawn, potentially having an impact upon UK & high risk country dual nationals, perhaps being unjustly denied certain financial services (life insurance is specifically mentioned in the consultation document, there are perhaps other financial products and services potentially caught up here).

Beneficial ownership disclosure

Article 30 of 4MLD has been increased in the 5MLD legislation to require obliged entities to report any discrepancies they discover in beneficial ownership information. The Government argues that the existing Persons of Significant Control regime operated via Companies House goes almost as far.

Obliged entities are required to be more proactive – to report discrepancies and take action to resolve them. But if you annotate the PSC register then would this constitute tipping off? And could that be counterproductive to the central aim of the legislation?

The Trust Registration Service has been live in the UK since 2017. 5MLD expands upon this to require trustees or agents of all UK and some EU resident express trusts to register via TRS, whether or not a trust has incurred UK tax consequences.

The legislation also includes a requirement to share data from TRS with a range of persons under certain circumstances (the 'legitimate interest' test). This will almost certainly form a key area of interest for HMRC's consultation later this year.

Other extensions to the scope of reporting will include non-EU resident trusts acquiring UK land or property on/after 10 March 2020; and non-EU resident trusts entering into new business relationships with obliged entities on/after 10 March 2020.

The consultation document very clearly states that 5MLD contains no scope for carve outs, exemptions or de minimis thresholds, despite it's status as a directive requiring transposition by local national governments.

Other categories of trust which are also likely to fall within 5MLD's scope include: discretionary trusts, interest in possession trusts, 'bare' trusts, charitable trusts and employee ownership trusts.

Another question arises as to how the new, extended disclosure requirements imposed on trustees would work with disguised remuneration regulations? A tax charge is legitimately deferred until assets are free to fund this, by ensuring that the trustee doesn't become aware of underlying beneficiaries' identities until the assets vest. But in 5MLD, the trustees seem to be required to identify beneficiary details including full name, DOB, at the outset of the arrangement.

Defining legitimate purpose

The UK Government believes that the definition of 'legitimate purpose' should protect beneficiaries from purely speculative enquiries (and thus protect their GDPR right to privacy) but this doesn't resolve the disguised remuneration regulation point.

The definition of a controlling interest of a trust (>25%) in 5MLD includes PLCs as corporate entities – plus control by other means taken to include establishing/amending profit sharing schemes, bonus, incentive schemes of any nature, plus the ability to grant options under a share option of other share-based incentive scheme.

Any legal person may request access to data regarding express trusts not registered on any EEA member state's corporate beneficial ownership registration. Data held within TRS can be requested by anyone – requests are 'purpose-blind'. The consultation specifically requests views on this.

ProShare is coordinating a share plans-focussed response to HM Treasury's consultation – do get in contact via team@proshare.org if you would like to contribute to this.

A handwritten signature in black ink, appearing to read 'Gabbi Stopp', with a long horizontal flourish underneath.

Gabbi Stopp
Executive Director ProShare