



Response from ICAS

Transposition of the Fifth Money Laundering Directive: consultation

7 June 2019

About ICAS

1. The following submission has been prepared by the ICAS Tax Board. The Board, with its five technical Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

General comments

2. ICAS welcomes the opportunity to contribute to the consultation on the Transposition of the Fifth Money Laundering Directive issued by HM Treasury on 15 April 2019.
3. Our response only considers the proposals in Chapter 9 for the expansion of the Trust Registration Service. We were pleased to attend the stakeholder meetings with HMT and HMRC on 26 April and 13 May 2019 to discuss this part of the consultation.
4. Our response concentrates on areas of concern to our members, but we have grouped our comments by reference to the questions in Chapter 9 of the consultation.
5. It is important that the definition of express trusts is as narrowly drawn as possible - to meet the requirements of the directive but no more. Detailed guidance will be essential to provide clarity on what is, or is not, included in the definition.
6. We believe that trusts which are express trusts under English or Scottish law, but which would not be express trusts elsewhere in the EU should be excluded from the definition: otherwise application of the directive will be more onerous in the UK than in other member states.
7. The data required for trusts without tax consequences should also be kept to the minimum required by the directive, to minimise compliance costs. We appreciate that some additional data may be required where there are tax consequences but providing the full range of information required for the existing version of the Trust Registration Service (TRS) has proved to be onerous for trustees and agents. A reduction in the amount of information required would therefore be helpful.
8. Protection against inappropriate release of data should be provided both by using an appropriate definition of legitimate interest (with suitable exemptions) and by ensuring that the process for releasing data includes scrutiny by an independent tribunal (either through pre-authorisation of requests or through a right of appeal).
9. There have been serious problems with the existing TRS system from its launch. Many of these are ongoing: it remains impossible to access data which has been submitted, or to make any amendments to that data and the current form is not straightforward to complete. It is vital that a fully functioning, user friendly TRS is available by April 2020, in time for the significant expansion of the registration requirements.

Extension of the registration requirement to non-taxpaying express Trusts (Questions 64 to 68)

10. As set out in the consultation, 4MLD required the UK to create a register for all express trusts with a UK tax consequence and resulted in the creation of the Trust Registration Service (TRS) in 2017. 5MLD expands the scope of the register and will require all UK and some non-EU resident express trusts to register, regardless of the existence of a UK tax consequence.
11. HMRC published the latest edition of its [Trusts Statistics](#) in February 2019. According to this report the "latest data" showed that 156,500 trusts and estates made self-assessment returns for the 2016/17 tax year. Of these 51,500 were interest in possession trusts, 89,500 were trusts paying tax at the trusts rate and 15,500 were 'others' (estates, charities etc); potentially, therefore, around 141,000 trusts might have needed to register.
12. The same report indicates that the TRS had 28,500 registrations at 31 January 2018 and 85,000 registrations at 5 March 2018. There were considerable problems with the launch of TRS so there will have been some late registrations after 5 March and some trusts may have been outside the scope of

the requirement, even though they filed a tax return. Nevertheless, the statistics suggest that significant numbers of trusts failed to comply with the registration requirement.

13. Trusts with a UK tax consequence are far more likely to have an agent acting for them, or at least to have taken some advice on completing tax returns, than other trusts – some of the problems with the launch of TRS arose from the fact that, whilst the TRS was made available to lead trustees in July 2017, agents were unable to access it at all until October and continued to have problems even after that date.
14. The large number of registrations between 31 January and 5 March 2018 undoubtedly reflects agents registering trusts after the end of the self-assessment season. Based on our experience, awareness of TRS amongst agents belonging to the main tax and accounting professional bodies was high by late 2017. Even so, some trusts appear to have failed to register, possibly because they had no professional advisers, or perhaps because any advisers were not tax specialists – and HMRC communications were inadequate.
15. The expansion of the requirement to register to non-taxpaying trusts is likely to present even more significant challenges in terms of compliance. Paragraph 9.12 of the consultation states that the government does not ‘expect to specify a full list of types of express trust’ which will need to comply – and that ‘the onus will be on trustees and their agents to determine whether their trust is an express trust or not’ based on guidance. This is unrealistic given the list of trusts which the consultation states are likely to fall within the definition of express trusts (which includes many types of bare trusts). Absolute clarity on what is, or is not, included in the definition is essential.
16. The proposed definition is very widely drawn; many unrepresented trustees and non-specialist advisers are likely to be completely unaware of the need to register or the need to take advice – many may not even realise that they have an express trust. The definition should be drawn as narrowly as possible – to meet the requirements of the directive but no more.
17. It will also be essential for HMRC to undertake a properly planned, timely and well-executed communications campaign aimed at those trusts which do not use an agent or specialist adviser. This is likely to be very difficult where trusts have no tax consequences. It reinforces our view that the definition should be drawn as narrowly as possible and that a full list of the types of trusts which will need to comply should be provided – to assist in targeting communications and to ensure that unrepresented trusts and non-specialist advisers can be pointed to detailed guidance which will help them to understand the requirements.
18. As mentioned at the April stakeholder meeting the distinction between a bare trust and a nominee-ship needs to be made clear. Preferably nominee-ships should be excluded.
19. There are also likely to be difficulties with insurance policy trusts (if these are included in the definition). It is often difficult to identify that there is a trust (it may be hidden away in the policy documentation). Advisers are unlikely to have retained records/full details of what has been set up in the past and clients are unlikely to understand what needs to be reported. The insurance companies may be the parties with the best/only records.
20. Paragraph 9.14 of the consultation notes that express trusts are more common in the UK than in other parts of the EU because of our common law jurisdiction, which means that many arrangements that are essentially contractual in civil law jurisdictions, would be treated as trusts under English law. It would make sense to exclude UK trusts which would not be express trusts elsewhere in the EU from the definition for the purposes of UK implementation; otherwise the application of the directive will be more onerous in the UK than in other member states. It seems unlikely that such trusts would present a significant risk in terms of money laundering – but there will be a considerable risk of widespread non-compliance due to the difficulties outlined above, if they are included.
21. At meetings with HMRC last year we raised the further issue that there are also arrangements which would be treated as express trusts under Scottish law but not under English law. This was also mentioned at the April stakeholder meeting and we understand that the Law Society of Scotland has supplied a list of examples to the consultation team. We do not believe that it makes sense to include such trusts in the requirement to register either.
22. We understand from statements by HMRC at the April stakeholder meeting that HMRC does not consider that jointly held property would constitute an express trust and also does not expect that jointly

held bank accounts (or accounts held by parents on behalf of children) will need to register as express trusts – because they will be covered by requirements imposed on banks. It would be helpful to have this confirmed in official guidance or in the legislation. However, it still leaves other grey areas where it has also been suggested that registration will be required, but where trustees will be very unlikely to realise that there is potentially an express trust which needs to register.

Data collection and costs (Questions 69 to 71)

23. We can see that it may be necessary to collect more information on trusts with tax consequences than those without. However, we agree with the comments in paragraph 9.26 of the consultation that providing the full range of information required for the existing version of TRS has proved to be onerous for trustees and agents. In some cases, often involving older trusts, some of the information was simply no longer available. A reduction in the amount of information required would be helpful.
24. We do not believe that the government should routinely require the provision of National Insurance or passport numbers; this has already caused problems with the existing TRS. As noted above in some cases the information will no longer be available (for example, for deceased settlors). It is difficult to see any justification for requiring it for the much larger numbers of trusts with no tax consequences.
25. To date TRS data has only been available to HMRC and to law enforcement agencies (when they request data from HMRC). 5MLD however means that data will potentially be available to anyone who claims to have a 'legitimate interest' in accessing that information. Trustees, beneficiaries and settlors are likely to have concerns about sensitive personal information being made available beyond HMRC and law enforcement agencies. Data such as dates of birth, passport numbers and NINOs could put individuals at risk of being victims of fraud. We discuss this further in our comments on 'legitimate interest' below.
26. It is likely that many trusts which do not currently use an agent will find it necessary to pay for advice if they fall within the definition of trusts required to register. This will therefore increase costs for those trusts – and the more data is required to be included in TRS the higher the costs are likely to be.

Registration deadlines and penalties (Questions 72 to 74)

27. The proposed deadline for unregistered trusts already in existence at 10 March 2020 is 31 March 2021. Paragraph 9.28 of the consultation describes this as a 'long lead in time' given the greater number of trusts that will need to be registered. However, this lead in time is only likely to be adequate if certain conditions are met. These would include using a sensible definition of trusts required to register (to keep registrations to the minimum necessary), the existence of clear, detailed guidance (well before March 2021), an HMRC communications campaign targeting unrepresented trusts to ensure that they are aware of the new rules well ahead of 31 March 2021, reasonable data collection requirements and a fully functioning TRS system (which currently does not exist – we discuss this further below).
28. The suggested 30 day deadline for trusts created on or after 1 April 2020 is also only likely to be realistic if the TRS system is fully functioning by April 2020. We suggest that initially a longer deadline of 60 days should apply, until it has been demonstrated that the TRS system is working properly and can cope with the volume of registrations. If everything is running smoothly, we suggest that the deadline should be reduced to 30 days from October 2021 (so that the reduction does not coincide with a possible peak in registrations of pre-existing trusts at the end of March 2021 which could put pressure on the online system).
29. Paragraph 9.31 of the consultation proposes that the deadline for amendments to be made to TRS data should also be 30 days; as noted above we suggest this should be no shorter than 60 days initially. However, we also question the need for notification of changes in such a short timeframe. Companies only need to update their confirmation statement once a year – this would seem to be a far more manageable approach for trusts.
30. Many trusts with tax consequences use agents – and agents may only find out about any changes as part of the annual process for filing the tax return. Trustees are often likely to know earlier – but will expect their agent to deal with updates. Imposing a 30 (or 60) day deadline for notification will increase the administrative burden and costs. We suggest that there should be a requirement to update details annually.

31. We note that there will be further consultation on a suitable penalty framework. As a general principle we suggest that HMRC should adopt a light touch approach, particularly to unrepresented trusts with no tax consequences. It will also be essential to provide clarity around the penalty regime and the approach to penalties at an early stage – this did not happen when the current TRS was launched.

Legitimate interest (Question 76)

32. Paragraph 9.43 notes that trusts are widely used across the UK for many 'ordinary' purposes, including for charitable purposes, to protect assets for children and vulnerable adults, in structuring pension schemes and for certain commercial purposes (including ring fencing funds for consumer protection). It also recognises the potential risks associated with sharing individuals and trusts' data without due cause and suggests that the definition of 'legitimate interest' should protect those persons whose data is held on TRS from purely speculative queries and from requests made for any inappropriate reason.
33. We cannot see that it would normally be appropriate to share any data (beyond HMRC and law enforcement agencies) which related to individuals in any of the categories listed in paragraph 9.43 – but particularly relating to children, vulnerable adults or pension scheme members (where the scheme is HMRC-registered). In addition to general privacy concerns, as noted above some data required for TRS would leave individuals at high risk of being victims of fraud; once HMRC has released information it will have no control over how that data is stored, protected or used.
34. Paragraph 9.48 states that the government will ensure that personal data on vulnerable individuals will receive special consideration and that it does not anticipate releasing information on minors, but we do not believe that this goes far enough.
35. In addition to allowing exemption for minors and others who are 'legally incapable' the directive permits exemptions where there would be disproportionate risk – including disproportionate risk of fraud (or kidnapping, blackmail, extortion, harassment, violence or intimidation). If the UK adopts a wide definition of 'express trusts' as discussed above, which brings in large numbers of trusts used for 'ordinary' purposes as set out in paragraph 9.43, where there is little or no risk of money laundering, it is likely that there will be a disproportionate risk, certainly of fraud, if personal data is disclosed.
36. Further consideration should be given to the scope of the exemptions to be included in the UK legislation to ensure that personal data will not be disclosed where the risk of money laundering arising from a trust used for 'ordinary' purposes is very low and hence the risk linked to disclosure is likely to be disproportionate.
37. Protection against an inappropriate release of data should not only be provided by using an appropriate definition of legitimate interest (with suitable exemptions) but also by the process for releasing data. Paragraph 9.47 states that this will be covered in more detail in a technical consultation – and that potentially a right of appeal may be appropriate. We believe that scrutiny of the process by an independent tribunal is essential. This could be provided in one of two ways. Either there should be a requirement for the independent tribunal to consider and authorise (or reject) requests for the release of data, or there should be a right of appeal to the independent tribunal.

HMRC's Trust Registration Service (TRS) (All questions but particularly questions 72 to 74)

38. The implementation of the TRS in 2017 was extremely poor and caused considerable difficulties for everyone who needed to use the system. As noted above agents were unable to access the TRS system until October 2017 and the deadlines for registration (for new and existing trusts) had to be extended. HMRC consistently failed to communicate adequately.
39. Even once agents were able to access TRS there were ongoing difficulties with the system, meaning that various workarounds were required; HMRC was unable to publish essential guidance on GOV.UK – instead relying on professional bodies to host vital information.
40. TRS still does not work properly. It has never been possible to access data which has been submitted, or to make any amendments to that data and the current form is not straightforward to complete. The significant expansion of the registration requirements required by 5MLD will only be workable if TRS is functioning properly by April 2020.

41. We are aware that HMRC has recently started piloting improvements to TRS. The [Trusts and Estates newsletter for April 2019](#) notes that firstly HMRC will replace the existing i-Form which allows a trust to be registered. Only after that will additional functions be delivered to allow users to:
- a. View the data submitted at registration;
 - b. Complete a declaration when there is no change to registered data;
 - c. Make changes to registered data to keep the register up to date;
 - d. Close a Trust or Estate.
42. These are all essential functions for the successful operation of the TRS. In view of the ongoing diversion of resources due to Brexit it is vital that HMRC has adequate staff and resources working on delivering a functioning TRS system.
43. In the light of problems being caused by Brexit and our experience with the rollout of the current TRS, we have serious concerns that a fully functioning TRS system will not be available by April 2020. If this is the case all proposed registration deadlines will need to be reviewed.
44. We also suggest, as noted above, that for new trusts (and amendments to data – subject to our comments above on a possible annual updating requirement) the initial deadline should be 60 days, until it has been demonstrated in practice that the system is working smoothly and can cope with the volume of registrations.
45. In view of the inadequate communications associated with the launch of the original TRS, we also suggest that agents and trustees should be able to register to receive email updates from HMRC about progress with upgrading the system and any essential guidance on using it (given that HMRC is unable to publish this in a timely fashion on GOV.UK).