



# Tensions between the drive for transparency & the right to protection of privacy

*Update on the UK government's proposal to improve transparency with a new register of persons with significant control of companies which hold UK property.*

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**I**N OUR LAST ARTICLE (<https://hubbis.com/article/transparency-enhanced-in-the-uk>) we looked at the UK government's proposal to improve transparency with a new register of persons with significant control of companies which hold UK property. Since then, it has not only published draft legislation for implementing such a register (the Registration of Overseas Entities Bill (the **Bill**) - July 2018), it has published two further consultations which address transparency issues, one in the context of reviewing the UK Taxation of Trusts (in November 2018) and the other on the transposition of the Fifth Money Laundering Directive (**AMLD5**) (April 2019). Moreover, in May, the House of Commons and House of Lords Joint Committee published their report scrutinising the Bill.

### Trust and confidentiality

The AMLD5 consultation considers, amongst other matters, the extent to which the ambit of the UK Trust registration is extended to a publicly (in certain circumstances) searchable register of the beneficial ownership of trusts - not just trusts which generate tax consequences in the UK but to any non-EU trust which enters into a business relationship with an "obliged entity" i.e. an entity already subject to anti-money

laundering procedures, regulations and requirements.

The common lawyer will recognise that the term "trust" itself can arouse conflicting emotions. In many civil law jurisdictions it is a structure which is often not well understood being alien to such legal systems and consequently evokes distrust.

In common law jurisdictions, trusts are also well recognised as a tool for estate planning, for protecting vulnerable beneficiaries and in a philanthropic and charitable context and have been used since medieval knights wishing to ensure their property was not only looked after while they were away on crusades, but importantly, that it was returned to them on their homecoming. A trust is therefore seen particularly by the private wealth adviser as a flexible friend and an invaluable tool in his or her estate planning armoury.

In these circumstances, the concept of trust and confidentiality are synonymous. And yet the trust has had, some would argue, more than its fair share of bad press and is often (incorrectly) seen as a vehicle for tax evasion or other improper purposes.

### Transparency

The UK government is one of the leaders in implementing the OECD Common Reporting Standard - and was one of the first jurisdictions to introduce a Trust Register, pursuant to its obligations under the EU Fourth Anti-Money Laundering Directive (**AMLD4**) which requires that trustees of express trusts which generate UK tax consequences (wherever in the world the trustees are



resident) keep records of beneficial ownership information and make certain disclosures to counterparties. Trustees must disclose that information to a central (but not public) register when the trust generates tax consequences. These measures are uncontroversial, since trustees should have records and report to HMRC in any event. The registration requirement adds a layer of administration and costs, but this is perhaps not unreasonable. And access to the register is limited to law enforcement agencies.

However, the proposal for an openly searchable register, included within AMLD5, is of concern. What is particularly mystifying is the UK's government's apparent (current) reluctance to stand firm on the issue of who should and who should not have access to the register which will be open to those (in addition to law enforcement agencies) who can demonstrate "a legitimate interest" in the information. It is clear that the EU had investigative journalists in mind, amongst others. In our view, it seems difficult to justify any policy whereby more information could be available in relation to assets held in trust (and their beneficiaries) than in relation to an individual taxpayer's personally-held assets.

This is particularly puzzling when the UK government expressly acknowledges in its consultation paper that the NRA [National Risk Assessment] concludes that UK trusts present a low risk of money laundering and terrorist financing. Transparency and confidentiality are not mutually exclusive aims.

Furthermore, it seems contrary to the spirit of the EU Directive, the objectives for which are outlined in the lengthy Preamble - notably Preamble 28 which provides: *"When determining the level of the beneficial ownership information of such trusts or similar legal arrangements, Member States should have due regard to the protection of the fundamental rights of individuals, in particular the right to privacy and the protection of personal data."*

### **What of the proposed property register?**

The draft legislation for the register intentionally carves out certain trusts from its scope. Whilst this has been welcomed by some, the joint committee's report on the Bill expressed concern that trusts could be used to circumvent the obligations imposed by the Bill, given that they fall outside its scope.



However, the government acknowledged that *“unlike companies, trusts are typically used by private individuals for managing family owned assets including for minors and vulnerable family members. HMRC have recently set up the Trust Registration Service and the data is shared with law enforcement which should allow them to identify who owns and benefits from trusts. Publishing these persons details would not be proportionate and effective especially as disclosure would undermine family confidentiality.”*

This presents a change of heart from the proposals included in AMLD5. One of the joint committee’s other key recommendations is that the Bill should be introduced at the same time as the transposing legislation for AMLD5. In part this is to avoid any incongruence, but the UK government is also confident that the measures to be introduced in AMLD5 will ensure that trusts are not used

to avoid the registration obligations imposed by the Bill.

The committee has also made a number of other noteworthy recommendations. In particular, the UK government had been considering whether a failure to comply with the new registration regime imposed by the Bill should be a criminal offence. The committee has recommended that civil penalties should be imposed initially on those who breach their obligations under the Bill, with possible criminal sanctions for non-payment to back these up.

The ongoing scrutiny in this area highlights the fundamental tension between the drive for transparency and the right to protection of privacy for personal data. We, along with many other firms whose clients will be affected by the proposals, are making strong representations to the UK government to consider its strategy carefully. ■

