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Wong, Simone (2017) *The New EU Anti-Money Laundering Directive: Farewell to transparency of UK trusts*. Trust Law International, 31 (3). pp. 137-151. ISSN 0962-2624.

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The New EU Anti-Money Laundering Directive: Farewell to transparency of UK trusts

By

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Introduction

The 4th EU Money Laundering Directive, i.e., Directive (EU) 2015/849 (hereafter ‘4AMLD’), came into force on 26 June 2015, and Member States were required to transpose the Directive into national law by 26 June 2017. One of the key aims of the 4AMLD is to enhance transparency and prevent the use of anonymity of offshore companies and accounts for the purposes of money laundering. There is further a shift in emphasis in the new Directive towards a risk-based approach, and obliged entities, such as, credit institutions, financial institutions and Trust and Company Service Providers (TCSPs), are required to undertake appropriate steps to identify and assess the risks of money laundering in their dealings with customers. In addition, the 4AMLD imposes an obligation on Member States to maintain a central register for beneficial ownership information of not only corporate and other legal entities but also trusts and other legal arrangements similar to trusts. Article 31 of the 4AMLD requires trustees of an express trust to obtain adequate, accurate and up-to-date information on beneficial ownership relating to the trust. This includes information about the settlor, the trustee(s), the protector of the trust (if any), the beneficiaries or class of beneficiaries, and any other natural persons who may exercise effective control over the trust.

The 4AMLD was transposed into UK law through the Money Laundering, Terrorist Financing and Transfer of Funds (Information of the Payer) Regulations 2017 (hereafter ‘Money Laundering Regulations 2017’) which came into force on 26 June 2017. This paper seeks to consider the potential impact of the 4AMLD on trusts in the UK, particularly the collection and disclosure of information regarding beneficial ownership of express trusts as well as the maintenance of a central register. The requirement on trustees to collect and make accessible information about the trust and the so-called ‘beneficial owners’ is aimed at making trust arrangements more transparent but seems at odds with the notion of a trust being a private and

confidential relationship. Where the express trust generates tax consequences, the 4AMLD requires that beneficial ownership information be held in a central register. Registration of trusts is not novel in the UK since trusts generating tax consequences are required to be registered with HM Revenue and Customs (HMRC) even prior to the Money Laundering Regulations 2017.

Shortly after the 4AMLD came into force, the European Commission began working on a set of proposals to amend the 4AMLD in order to take a stricter approach towards tackling not only anti-money laundering and countering financing of terrorism but also other financial crimes, such as, tax evasion. The draft 5AMLD¹ was first published in July 2016. These developments took place against the backdrop of some high profile incidents of tax evasion, e.g., the publication of the Panama Papers. Coupled with an increasing global desire for greater financial transparency reflected in international measures, such as, the OECD's Common Reporting Standard (CRS), the 4AMLD and the amendments proposed by the 5AMLD are part of this trend.

However, the demand for greater financial transparency may potentially conflict with notions of privacy and confidentiality. John Riches, for instance, observes in 2013 as follows:²

[I]n the past two decades there has been a paradigm shift in the view of policy makers and legislators to the appropriate boundaries that exist with respect to what is the legitimate boundary of privacy and confidentiality of a person's financial affairs. The new imperative is to create a more transparent environment ...

This 'new imperative' is reflected by the 5AMLD's proposed widening of both the recording of and access to beneficial ownership information in central registers. For the purposes of this paper, the focus is on trusts. This expansion of financial transparency raises concerns about how the processing of more financial information and the wider access to such information about trusts is to be reconciled with rights to privacy and confidentiality. At present, the UK has just implemented 4MDL. Given UK's commitment to increasing financial transparency, it is likely that, notwithstanding Brexit, further changes along the lines proposed by the 5AMLD will be implemented by the UK once that Directive comes into force.

¹ Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, COM (2016) 450, final (hereafter 'the 4AMLD').

² John Riches, 'Are transparency and the registration of trusts necessary?' (2013) 19(3&4) *Trusts & Trustees* 343, 343.

The issues discussed in this paper are not intended to be exhaustive. The paper focuses on, firstly, the salient articles of the 4AMLD that apply to trusts and the changes brought about by the Money Laundering Regulations 2017 as a result of the transposition of the 4AMLD into UK law. It then considers the amendments to the 4AMLD being proposed by the 5AMLD and, relatedly, some of the issues that may potentially arise, particularly relating to privacy and confidentiality of beneficial ownership information.

The 4AMLD

One of the key aims of the 4AMLD is to enhance transparency and prevent the use of anonymity of companies, other legal arrangements, such as, trusts, and accounts for the purposes of money laundering and terrorist financing. There is further a shift in emphasis in the 4AMLD towards a risk-based approach whereby obliged entities, such as, credit institutions, financial institutions and Trust and Company Service Providers (TCSPs), are required to undertake appropriate steps to identify and assess the risks of money laundering and terrorist financing in their business dealings with customers.³ The 4AMLD therefore pushes for greater financial transparency on the basis that the availability of accurate and up-to-date information about beneficial owners is crucial to tracking criminal activities and preventing opacity through criminals hiding their identities behind corporate and other seemingly similar legal structures. It imposes an obligation on Member States to maintain central registers that will hold information pertaining to the beneficial ownership of corporate and other legal entities.⁴ As part of a wider desire for transparency, the 4AMLD further imposes an obligation on trustees to obtain and hold information on what is termed as ‘beneficial ownership’ of the trust. The information required broadly covers persons who provided the trust funds/assets, administer and manage the trust, have or may have effectively control over the trust, and have or may potentially have a benefit from the trust.⁵ The 4AMLD further requires Member States to hold the beneficial ownership information on trusts that generate tax consequences in a central register.⁶

There are some parallels between the reporting of beneficial ownership information under the 4AMLD and the CRS. For instance, the 4AMLD uses a definition of beneficial ownership that is similar to the one used by the CRS. Article 31 of the 4AMLD provides that trustees of an

³ 4AMLD, recital (22).

⁴ Ibid, recital (14).

⁵ Ibid, recital (17) and Article 31(1).

⁶ Ibid, Article 31(4).

express trust are required to obtain adequate, accurate and up-to-date beneficial ownership information relating to the trust which includes information of the following parties: the settlor; the trustee(s); the protector of the trust, if any; the beneficiaries or class of beneficiaries; and any other natural persons who may exercise effective control over the trust. The CRS also requires financial institutions to provide information of reportable accounts of individuals and entities, which include trusts. Thus, disclosure of financial information relating to trusts is not unique to the 4AMLD. There are, however, differences between the CRS and the 4AMLD. Of particular relevance for this paper is the fact that the CRS was conceived and developed as a new single standard for the automatic exchange of information for the purposes of fighting tax evasion and ensure tax compliance. The scope of the 4AMLD, on the other hand, is broader as its purposes are not limited to the narrower remit of tax evasion but rather extends to anti-money laundering and countering the financing of terrorism. The automatic exchange of information under the CRS is also confined to exchanges between the tax authorities of participating jurisdictions and the information is not made available to the public. The 4AMLD currently restricts access to central register information of trusts to law enforcement authorities and Financial Intelligence Units (FIUs) as well as ‘obliged entities’ for the purposes of customer due diligence checks.⁷ The scope of access, however, is set to change under the 5AMLD which aims to provide wider access to such information through public central registers.

Transposition of the 4AMLD into UK law

The 4AMLD was transposed into UK law as the Money Laundering Regulations 2017 on 26 June 2017. The Trusts Registration Service, an online registration system, was launched to coincide with the coming into force of the Money Laundering Regulations 2017. It replaces the previous paper-based Form 41G (Trust) which ceased to be accepted since the end of April 2017. The new framework will provide a single online register operated by HM Revenue and Customs (HMRC) in order for trustees to comply with their reporting obligations. The definition of ‘beneficial owner’ in the Money Laundering Regulations 2017 follows the 4AMLD, i.e., it includes the settlor, trustees, beneficiaries or class of beneficiaries and any other person having control over the trust, but omits specific reference to ‘protector’.⁸ ‘Protector’ was initially included in the ‘beneficial owner’ definition when HM Treasury held its consultation on the

⁷ Ibid, Article 31(4).

⁸ See Money Laundering Regulations 2017, regulation 6(1) for the definition of ‘beneficial owner’.

Money Laundering Regulations 2017.⁹ HM Treasury does not state explicitly the reason for omitting ‘protector’ from the final version of the definition in the Money Laundering Regulations 2017.¹⁰ It may be that reference to ‘any other person having control over the trust’ is seen as being sufficiently broad to include protectors. This view may be supported by the interpretation given to the notion of ‘control’ in the Money Laundering Regulations 2017. The Regulations provide that ‘control’ over a trust means having powers that affect the operation and/or administration of the trust, such as, dispositive powers over trust property, variation/termination of the trust, removing/adding beneficiaries or trustees and directing, withholding consent to or vetoing the exercise of a power.¹¹

The requirement to report beneficial ownership information about a trust applies a ‘relevant trust’, i.e., an express trust that is liable to pay any of the taxes listed in regulation 45(14) of the Money Laundering Regulations 2017, such as, income tax, capital gains tax, non-resident capital gains tax, inheritance tax, stamp duty land tax or stamp duty reserve tax. The Money Laundering Regulations 2017 sub-divides ‘relevant trust’ into two categories. The first is a ‘UK trust’. This refers to UK-resident trusts which are primarily determined by the residence status of the trustees and/or the settlor rather than the *situs* of trust assets. The second is a trust anywhere in the world, i.e., a non-UK resident trust which either receives income from a UK source or has assets in the UK.¹² A trust would be a ‘UK trust’ for the purposes of the Money Laundering Regulations 2017 where either all the trustees are, or at least one of them is, resident in the UK, and the settlor was resident and domiciled in UK when the trust was set up or when he or she added funds to the trust.¹³ Where the trustee or settlor is a corporate entity, it is resident in the UK where it is a UK corporate body. A trustee or settlor who is an individual will be resident in the UK if he or she is liable for any of the taxes listed in regulation 45(14).¹⁴

The Money Laundering Regulations 2017 sets out in regulation 44 the obligations of trustees in relation to the provision and maintenance of beneficial ownership information. Trustees are required to maintain accurate and up-to-date written records of beneficial ownership, and to retain those records for five years after the date of final distribution. The information required

⁹ See HM Treasury, *Consultation on the transposition of the Fourth Money Laundering Directive* (September 2016), para 10.15 available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553409/4mld_final_15_sept_2016.pdf accessed 15 June 2017.

¹⁰ See HM Treasury, *Money Laundering Regulations 2017: Consultation* (26 June 2017), para 9.2, available at: <https://www.gov.uk/government/consultations/money-laundering-regulations-2017/money-laundering-regulations-2017#beneficial-ownership> accessed 15 June 2017.

¹¹ Money Laundering Regulations 2017, regulation 6(2).

¹² Ibid, regulation 42(2)(e).

¹³ Ibid, regulation 42(2)(c) and (d).

¹⁴ Ibid, regulations 42(3)(a) and (b).

from the trustees about the trust and beneficial ownership involves disclosure of a range of what would otherwise be confidential information about the trust.¹⁵ Firstly, specific information about the trust itself must be provided, such as, the name of the trust, the date the trust was set up, account statements and value of assets, the trust's country of residence for tax purposes, a contact address for the trustees, and the names of any legal, financial or tax advisers to trustees.¹⁶

There must also be full disclosure of the so-called 'beneficial owners'. Where the beneficial owner is an individual, the information required from the trustees include: the individual's name; NI number/tax reference; usual residential address and where it is a non-UK address, details of passport/ID; date of birth; and the nature of individual's role within the trust.¹⁷ Information regarding the description of the class of persons who are beneficiaries, not all of whom have been determined, or potential beneficiaries should also be provided.¹⁸ This would include, e.g., beneficiaries of a discretionary trust who are not named individually but described as a class and even beneficiaries who are named in letters of wishes from the settlor, regardless of whether a distribution has been made to them.¹⁹ Where beneficial owners are legal entities, the information required includes: the entity's corporate/firm name; tax reference; registered/principal office; legal form and governing law; its name on companies register, country and registration number; and its role within the trust.²⁰

With respect to the meaning of 'express trust', the 4AMLD is silent on the precise scope of express trusts caught by the definition. While it is clear that the 4AMLD excludes from its scope other types of trusts, e.g., resulting and constructive trusts, 'express trust' could extend to other types of express trust, such as, statutory trusts. For instance, under English property law, a statutory trust (trust of land) is created when legal title to land is conveyed to more than one person. The legal co-owners hold title under a non-severable joint tenancy and the number of joint tenants is limited to four.²¹ Given the scale of co-ownership of land, the application of Article 31 of the 4AMLD to trusts of land would be problematic if a broad interpretation of 'express trust' were to be taken as the scope of the definition might be over-inclusive. At a

¹⁵ Ibid, regulation 45.

¹⁶ Ibid, regulation 45(5).

¹⁷ Ibid, regulation 45(6).

¹⁸ Ibid, regulation 45(8).

¹⁹ HMRC has, however, clarified that information of individual beneficiaries named in letter of wishes would not be required if they were named as a class of beneficiaries. See Emily Deane, 'HMRC consultation on 4AMLD implementation' (The STEP Blog, 6 April 2017) available at <https://blog.step.org/2017/04/06/hmrc-consultation-on-4aml-implementation/> accessed 3 July 2017.

²⁰ Money Laundering Regulations 2017, regulation 45(7).

²¹ Law of Property Act 1925, ss 1(6) and 36.

practical level, that would place an untenable burden on trustees, including trustees of trusts of land, to comply with the 4AMLD reporting obligations.

The UK government's view is that, for the purposes of the Money Laundering Regulations 2017, 'express trust' should be taken to mean 'a trust that was deliberately created by a settlor by expressly transferring property to a trustee for purposes of holding it on trust'.²² At the close of the Consultation, the Treasury clarified that 'express trusts' would exclude statutory, resulting or constructive trusts.²³ A further question is whether 'express trust' would apply to testamentary trusts, thus requiring beneficial ownership information on those trusts to be reported under the Money Laundering Regulations 2017. The Treasury confirms in its Consultation outcome report that express trusts will cover not only *inter vivos* but also testamentary trusts. Beneficial ownership information will therefore have to be reported to the HMRC where an express trust created in a will generates a tax consequence.²⁴ The understanding of 'express trust' in English law may, however, be more nuanced. For instance, a will might provide for a secret trust. When a testator dies and as part of the probate process, his will becomes a public document and is open to public scrutiny as copies of wills can be obtained from the courts by paying the requisite fee.²⁵

Secret trusts are often made due to the testator not having decided what bequests to make and to who at the time of making the will and/or his or her desire to avoid making public who the beneficiaries are. This is because the existence of the trust as well as the beneficiaries will not be evident on the face of the will. There is academic debate about the precise nature of secret trusts, particularly fully secret trusts, i.e., whether these trusts are constructive or express trusts. If one adheres to the fraud theory for the recognition of a secret trust, the trust would fit more neatly into the category of constructive trusts.²⁶ In that case, it may be argued that provision for a secret trust in a will would not require beneficial ownership information on the trust to be reported. On the other hand, the 'outside of the will' theory, which is the modern analysis that has gained greater traction within legal discourse, would classify a secret trust as an express trust.²⁷ That means that a secret trust would equally be caught by the reporting obligations of the Money Laundering Regulations 2017. The requirement to report beneficial ownership

²² HM Treasury (n 10) para 9.2.

²³ *Ibid.*

²⁴ *Ibid.*, para 9.2.

²⁵ There seems to be an innate public curiosity about how wealthy celebrities are and what testamentary bequests they have made when they die. Examples of such public curiosity can be seen from details of wills being published in newspapers after the death of well-known personalities, such as, Princess Diana in 1997 and David Bowie in 2016.

²⁶ *McCormick v Grogan* (1869) LR 4 HL 82; *Blackwell v Blackwell* [1929] AC 318.

²⁷ *Re Snowden* [1979] 2 All ER 172.

information on a secret trust, however, would contradict the very purpose of the creation of a secret trust in the first place: to keep the trust and its beneficiaries away from prying eyes!

Given the personal and confidential nature of the information required from trustees, the Money Laundering Regulations 2017 provides protection against liability for disclosure of information which is otherwise protected by a duty of confidentiality.²⁸ Earlier discussions between STEP and HMRC in the earlier part of 2017 indicates that HMRC had, at that time, yet to clarify whether it would be necessary to submit updates in following years where trust is dormant or has not generated any tax consequences.²⁹ This seems to be clarified in regulation 45(3) of the Money Laundering Regulations 2017 which provides that trustees of a taxable trust are required to update the register information for each year that the trust generates a UK tax consequence by 31 January after the end of that tax year rather than on an automatic annual basis. For the present, the Money Laundering Regulations 2017 provides that the beneficial ownership information relating to trusts will only be accessible to law enforcement authorities and FIUs of the UK and any EEA state.

The proposed changes in the 5AMLD: Transparency v Privacy

Against the backdrop of scandals like the Panama Papers, the European Commission published the proposed amendments to the 4AMLD on 5 July 2016 (hereafter ‘the 5AMLD’).³⁰ Since then, there have been extensive discussions on the European Commission’s proposals which led to the publication of several Presidency compromises. The latest compromise text of the 5AMLD was published on 13 December 2016 (hereafter ‘the revised 5AMLD’).³¹ The revised 5AMLD is aimed at facilitating even greater financial transparency. One of the ways in which the revised 5AMLD seeks to do this is by providing authorities and FIUs with timely and *unrestricted* access to beneficial ownership information. For instance, wider powers are to be given to FIUs in terms of access to beneficial ownership information. The Commission states that unfettered access to information is essential to ensure illicit flows of funds are properly traced and detected. To facilitate this, the proposed amendments provide for a shift from investigation-based access,

²⁸ Money Laundering Regulations 2017, regulation 44(7).

²⁹ Deane (n 19).

³⁰ Available at: <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:52016PC0450&from=EN> accessed 13 June 2017.

³¹ The latest compromise text of 13 December 2016 is available at: <http://data.consilium.europa.eu/doc/document/ST-15468-2016-INIT/en/pdf> accessed 17 June 2017. It supersedes the previous compromise text of 25 November 2016 available at <http://data.consilium.europa.eu/doc/document/ST-14884-2016-INIT/en/pdf> accessed 15 June 2017.

triggered by suspicious transactions, to intelligence-based access for FIUs.³² That means that FIUs would be permitted to have access to beneficial ownership information held in registers even when there is no suspicion of any wrongdoing. With respect to trusts, this drive for greater financial transparency has translated into an extension of the requirement for the reporting of beneficial ownership information to *all* express trusts, regardless of whether they have generated any tax consequences.³³ The revised 5AMLD therefore seeks to, amongst other things, enhance the accessibility of beneficial ownership information.³⁴

The revised 5AMLD further provides for greater financial transparency through the implementation of public registers. According to the European Commission, a justification for enhancing access to beneficial ownership information on both corporate entities and trusts is that understanding such information is necessary for mitigating the risk of financial crime and formulating prevention strategies. The amendments would further bring about an alignment of the beneficial ownership registers on trusts with corporate entities in terms of transparency and publicity. The Commission explains that compulsory (public) access to beneficial ownership information will enable greater scrutiny by civil society, which would in turn assist in the preservation of public trust in the integrity of business dealings and the financial system, i.e., generating market and investor confidence.³⁵ This would include scrutiny by, for instance, investigative journalists and civil society organizations (e.g., non-governmental organisations, such as, Tax Justice Network), which would in turn provide an additional layer of monitoring and policing. A further argument made in favour of public access is that it ‘facilitates the timely and efficient availability of information for financial institutions as well as authorities, including authorities of third countries’.³⁶ In order to achieve this, central registers must be interconnected via the European Central Platform.³⁷

Given that financial institutions and authorities are permitted to have access to beneficial ownership information under the 4AMLD, it is unclear why and how having public registers would necessarily add to their having access in an even more ‘timely and efficient’ manner. The drive for public registers seems in part to be politically motivated in that it is aimed at appeasing public outrage when scandals relating to tax evasion, money laundering and terrorist financing are exposed by the media. The push for public registers might be seen therefore as a public

³² Revised 5AMLD, recital (14).

³³ See amendment to Art 31 of the 4AMLD proposed by Art 1(10) of the revised 5AMLD.

³⁴ See Explanatory Memorandum to the 5AMLD, at p. 3.

³⁵ *Ibid*, at p.16.

³⁶ *Ibid*.

³⁷ Revised 5AMLD, insertion of a new para. (9) in Article 31 of 4AMLD.

relations exercise by states to show a shared consensus of the morally, if not legally, reprehensible nature of these types of financial crimes and a zero tolerance towards them. This may be reflected by the European Commission stating that the previous ‘market and investor confidence’ rationale for increasing transparency of beneficial ownership information must pave the way for greater public scrutiny. Increasing public access to beneficial ownership would, according to the Commission, serve to prevent the misuse of corporate entities and trusts through enhanced scrutiny. This panders to the increasing demands of only particular sectors of the public who are interested in gaining greater access to such information which they would not otherwise have.

The proposed expansion of public access to beneficial ownership information on trusts raises a number of concerns about the potential tension between the privacy and transparency of a trust. This section will examine some of these concerns. The first relates to the conceptual/definitional issues that arise with the use of the term ‘beneficial ownership’ to capture a group of individuals who may have very different types of rights and interests in the trust. The second is the expansion of access to financial information to those with a ‘legitimate interest’. Thirdly, the section will consider the privacy and data protection concerns that arise as a result of both the increased scope of beneficial ownership information that has to be reported and making such information publicly available.

(i) The ‘beneficial ownership’ conundrum

The notion of ‘beneficial ownership’ relates to the rights that one has to specific property in equity even though legal title to that property is held by someone else (the trustee). This separation of legal and equitable title means that the equitable owner has the right to the economic benefit of the property. For instance, Aitkens LJ in *Williams v Central Bank of Nigeria* states that:³⁸

[I]n English law an express trust is created when a person (the settlor) directs that certain identified property (the trust property) will be held either by him or by others (as trustees) under a legal obligation which binds the trustees to deal with that property, which is owned by them as a separate fund, for the benefit of another (the beneficiary) who has an equitable proprietary interest in the trust property and its fruits from the moment it is created.

³⁸ [2013] EWCA Civ 785, at [37].

There is, however, a debate about whether the nature of a beneficiary's interest is in fact *in personam* or *in rem*. Earlier cases tended to view the beneficiary's interest as being a right to compel the trustee to perform the trust in accordance with its terms and to remedy any loss or harm suffered as a result of a breach by the trustee. We therefore see the development of equitable principles, such as, the 'beneficiary principle' which requires (human) beneficiaries for a valid private trust to be created so that they are able to police and ensure performance by the trustees of their obligations.³⁹ This view makes the beneficiary's right under the trust akin to a right *in personam*.

Yet, categorising the nature of the beneficiary's interest as being personal may not be wholly accurate. We see how the beneficiary's interest has taken on a proprietary aspect which enables that interest to be enforceable against the world except a bona fide purchaser for value. This type of proprietary analysis of a beneficiary's interest can be seen in situations dealing with, e.g., the beneficiary's right to trace or follow assets when there is a misappropriation of trust property,⁴⁰ and for disclosure of information about the trust.⁴¹ The notion of 'beneficial ownership' in relation to beneficiaries therefore does not fit into a neat dichotomous classification of either personal or proprietary rights. Instead, the rights of the beneficiaries under the trust, including over the trust property, involves a complex set of legal relations and the use of the term 'ownership' may not necessarily be the most appropriate way of describing their interest. Even if beneficiaries are broadly treated as having an equitable proprietary interest in the trust property, whether they do in fact have such a vested equitable interest for the purposes of, say, tax, would depend on the type of trust in question. This adds another layer of complexity to pinning down precisely the rights of beneficiaries since distinctions are needed between trusts, e.g., fixed and discretionary trusts. To describe beneficiaries under a discretionary trust as 'beneficial owners' would be somewhat stretching the notion of ownership. Pending any distribution of trust property to a beneficiary, the orthodox view is that the beneficiary's interest under the discretionary trust lies in having certain rights, particularly the right to be considered by the trustee or any donee of powers as a potential recipient, rather than an equitable proprietary interest in the trust property.⁴²

³⁹ The classic authority for the beneficiary principle is *Morice v Bishop of Durham* (1804) 9 Ves 399.

⁴⁰ *Foskett v McKeown* [2001] 1 AC102, where Lord Millet (at p 128) stated that 'the process [of tracing] by which a claimant demonstrates what has happened to his *property*, identifies its proceeds and the persons who have handled or received them'. (emphasis added)

⁴¹ *Re Londonderry's Settlement* [1965] Ch 918. The 'proprietary right' approach taken in *Re Londonderry* to disclosure and its link to what might be classified as trust documents has since been superseded by cases like *Schmidt v Rosewood* [2003] 2 WLR 1442 where disclosure falls within the court's inherent supervisory jurisdiction.

⁴² See, e.g., *Gartside v IRC* [1968] 1 All ER 12; *Vestey v IRC (No 2)* [1979] 2 All ER 225.

It is equally problematic to define the trustee or the settlor as a 'beneficial owner'. While the trustee may hold legal title, he holds only nominal ownership in the trust property and does not in fact hold any equitable beneficial ownership in the property. The settlor similarly does not retain any equitable interest in the trust property once the trust property has been effectively transferred to the trustee and the trust is fully constituted. A settlor who has fully divested himself of any proprietary interest in the trust property is, strictly speaking, no longer the owner of the trust property, whether legal or equitable. The extent to which the settlor might retain powers under the terms of the trust so that he is able to exert control over the trust is quite a different from and should not be equated with ownership rights. The settlor's rights to control the administration of the trust by the use of, e.g., letters of wishes and retention of powers, such as, powers of appointment, to remove and/or appoint new trustees, etc, under the terms of trust, must be clearly distinguished from ownership. The instances when the settlor may still have some form of interest as 'owner' in the trust property after the creation of the trust is when it is a self-declared trust (where the settlor then becomes the trustee), or the settlor is named as a beneficiary or has not effectively divested his interests, in which case a resulting trust arises in the his favour.⁴³ Likewise, a donee of powers or a protector may have wide powers given to them under the terms of the trust which enable them to control the administration of the trust. However, the orthodox position is that neither the donee nor the protector is treated as having any equitable interest, let alone an interest that is tantamount to ownership, in the trust property.

The extension of the definition of 'beneficial ownership' to parties, such as the settlor and the donee of powers, may be over-inclusive. The concern here seems more to do with the extent to which these parties may be exercising effective *control* over the trust so as to direct the way in the trustees administer the trust and exercise their discretion in distributing or allocating trust assets. While control may be a characteristic of ownership, whether legal or equitable, in that an owner is permitted to exercise control over his property, control *per se* is not necessarily equivalent to having ownership rights.⁴⁴ The adoption of a loose definition of 'beneficial ownership' that conflates ownership and control obscures the substantive nature of beneficial ownership in the context of trusts.

⁴³ See, e.g., *Vandervell v IRC* [1967] 2 AC 291.

⁴⁴ See, e.g., cases involving expropriation of property under Art 1 of Protocol 1 (right to peaceful enjoyment of possessions) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, such as: *Marckx v Belgium* (1979) 2 EHRR 330; *Kopeccky v Slovakia* (2005) 41 EHRR 43; *Papamichalopoulos v Greece* (1993) 16 EHRR440; *Vasilescu v Romania* (1998) 28 EHRR 241. These cases indicate the distinction between control and ownership. They illustrate the severable concepts of control and ownership, and how the loss of control of assets could be an indicator of a loss of peaceful enjoyment of assets in which one has proprietary rights, without necessarily a loss of ownership rights.

This conflation of ownership and control stems in part from an attempt to equate trusts with corporate vehicles. One thing that shareholders and beneficiaries seemingly have in common is that they are able to distance themselves as owners of assets, which results in their creditors being excluded from those assets in the event of their insolvency. The creation of trust registers in order to enhance transparency has in part been fuelled by arguments that trusts are in fact similar to corporate entities as they allow for separation of ownership between different persons. However, trusts are viewed with greater suspicion due to their ability to be less transparent and for trust property to be, as some argue, ‘ownerless’ or for ownership to be held in limbo.⁴⁵ This makes trusts vulnerable to abuse and misuse and, as the arguments goes, there should be thus equivalent treatment of companies and trusts in order to curb such abuse. The drive then is to fit trusts within a regulatory mould that primarily deals with corporate entities.

Others, however, question the equivalence of a trust and a corporate entity. Goldsworth, for instance, argues that the inclusion of trusts in the OECD’s report on the abuse of corporate vehicles is misleading and a mistake. He states as follows:⁴⁶

By including trusts amongst corporate vehicles (even if the definition problem is ignored) practical and theoretical problems immediately arise. The emphasis on beneficial ownership and control of corporate vehicles suggests that the beneficial ownership of shares in a company which allows control of that company is equivalent to some form of beneficial ownership and control of a trust.

While there is no lack of consensus that trusts can potentially be abused and misused, there is significant difference of opinion as to the necessity for as well as scope of transparency and registration of information on trusts.⁴⁷ It is therefore necessary to exercise caution with pushing through even further a political agenda for transparency where there is increasing alignment of trusts and corporate entities, without more careful consideration of their practical and legal differences.

⁴⁵ See, e.g., Andres Knobel, *Trusts: Weapons of Mass Injustice?* (Tax Justice Network, 13 February 2017) available at <http://www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf> accessed 15 June 2017.

⁴⁶ John Goldsworth, ‘Trusts and the Misuse of Corporate Vehicles for Illicit Purposes: the OECD’s view examined’ (2001) 7(9) *Trusts & Trustees* 15, 16.

⁴⁷ See, e.g., Filippo Nosedà, ‘Caught in the crossfire between privacy and transparency’ (2016) 22(6) *Trusts & Trustees* 599; David Russell and Toby Graham, ‘Maintaining the rage: the European Union’s attack on trusts at home and abroad’ (2017) 23(2) *Trusts & Trustees* 145; and ‘Trusts: Weapons of Mass Injustice or Instruments of Economic Progress?’ (2017) 23(4) *Trusts & Trustees* 363; John Riches, ‘Beyond tax transparency: secrecy, privacy and security’ (2017) 23(1) *Trusts & Trustees* 115.

In order to reduce the conceptual/definitional confusion, it would be useful for the Money Laundering Regulations 2017 to provide a clearer definition of ‘beneficial ownership’ for trusts that draws a sharper distinction between notions of ownership and control. The need for such distinction is not merely a matter of semantics or being pedantic. Where a settlor continues to exert wide, and even unfettered, control over a trust, it may be argued that the trust might possibly be a sham.⁴⁸ In that case, the settlor might be seen as still being beneficially entitled to the trust property.

It also assumes that beneficiaries of a trust, whether fixed or discretionary, are always able to control the trust by being involved in decision-making. An attempt is made to analogise beneficiaries’ interests under a trust with the interests of shareholders of a company. This analogy is both misleading and inaccurate. Shareholders strictly speaking do not own the company’s assets; they do not have legal or beneficial ownership rights in the company’s assets. What they actually own are the shares in the company. With their ownership of shares, shareholders have voting rights and a majority shareholder might be able to control the company by, e.g., being appointed onto the Board of Directors and/or using his voting rights at general meetings. Unlike a shareholder, a beneficiary does not have a voting right to determine how a trustee or a donee of a power of appointment should exercise the discretion given to them. At a practical level, the exercise of trustees’ dispositive discretion, particularly in family trusts, may in some circumstances be ‘controlled’ by someone else, e.g., the settlor. Trustees are nonetheless obliged to act in good faith and exercise their discretion, including acting in the best interests of all, and not just one or some, of the beneficiaries as well as in an even-handed manner.

The importance of drawing a distinction between ownership and control of trust property can be seen further in divorce cases involving financial relief. The courts may, in some circumstances, indirectly attribute beneficial ownership to a beneficiary under a discretionary trust, e.g., where a financial relief application is made by the spouse of the beneficiary under ss 23 and 24 of the Matrimonial Causes Act 1973. In such cases, the court may find that the beneficiary exercises effective control over the trust so that the trust assets may potentially be financial resources available for redistribution under the Matrimonial Causes Act 1973.⁴⁹ However, that finding does not mean that the beneficiary, or even the settlor, is the *de facto* owner of the trust property. Instead, the court’s finding mainly forms ‘judicial encouragement’ to the trustees to make a

⁴⁸ However, the courts are generally cautious about holding a trust as a sham. See, e.g., *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1.

⁴⁹ See, e.g., *Browne v Browne* [1979] 1 FLR 291; *Charman v Charman* [2005] EWCA Civ 1606; *Tchenguiz-Imerman v. Imerman* [2014] 2 FLR 939.

disposition in favour of the beneficiary so that he or she then has the resources to meet any financial relief order made against him or her by the court. Until the trustee's exercise of a dispositive discretion in favour of the beneficiary, the beneficiary's only right is to be considered rather than any direct proprietary rights tantamount to ownership of the trust property generally or even to the portion that may potentially be allocated. It is thus important to draw clearer conceptual distinctions between control and ownership in the definitions used to describe the rights and interests of parties to a trust arrangement in order for the appropriate information to be reported rather than the current approach of 'one size fits all'.

(ii) Meaning of 'Legitimate interest'

The proposed amendments in the 5AMLD initially sought to provide full public access to beneficial ownership on trusts.⁵⁰ The scope of public access was subsequently diluted in the revised 5AMLD to members of the public who have a 'legitimate interest'.⁵¹ Beneficiaries, and even potential ones, may often have an interest in getting hold of information about a trust. However, the wider public access to beneficial ownership information being proposed by the 5AMLD will not be of much assistance to beneficiaries seeking more information about the trust unless they are able to demonstrate that they have a 'legitimate interest'. In the compromise text on the 5AMLD of 25 November 2016, parties with a 'legitimate interest' were described as any person or organisation who can demonstrate engagement with or proven track record in activities related to fighting money laundering and terrorist financing, or 'associated predicate offences' activities.⁵² Their access was further confined to information relating to the name, date of birth and country of residence of beneficial owners.⁵³

Restricting public access to central register information on trusts to those with a legitimate interest might seem like a logical and practical compromise to allay fears of confidentiality and privacy breaches. There is nevertheless an issue about the precise meaning of 'legitimate interest'. The meaning of 'legitimate interest' was initially linked with 'engagement with or proven track

⁵⁰ See the initial new para (4a) to Art 31 proposed in the 5AMLD.

⁵¹ See revised 5AMLD, recitals (22a) and (35).

⁵² 'Associated predicate offences' is not defined in the 4AMLD or the 5AMLD but might arguably include criminal conduct, such as, corruption, bribery, tax evasion and fraud. See 4AMLD, recital (14) which cites corruption, tax crimes and fraud as examples. Recital (14a) of the revised 5AMLD acknowledges that the definition of 'associated predicate offences' is not harmonised in the EU and is determined by the national laws of Member States. That may result in differences in, or even a lack of, legal definition but should not prevent FIUs from exchanging information with other FIUs.

⁵³ Cf the wider range of information that trustees are required to provide for the online register under regulation 45(5) and (6) of the Money Laundering Regulations 2017.

record' in activities fighting, for instance, money laundering but that does not necessarily help to resolve the uncertainty of that term. The revised 5AMLD of 13 December 2016 removed that reference and provided in replacement that it should be left to Member States to provide a clear rule on and set the conditions for access based on 'legitimate interest'.⁵⁴ However, in the absence of clearer guidelines on the substantive meaning of 'legitimate interest', there is the danger of disparate legal meanings being adopted by Member States which would in turn affect the scope of access to information.

The question of whether a party seeking access to beneficial ownership information has a sufficient 'legitimate interest' would arguably be one of fact. The precise evidentiary threshold that needs to be met in order to satisfy the criteria set for establishing the requisite 'legitimate interest' is not clear cut. It is also unclear whether there will be adequate scrutiny and evaluation by authorities of the eligibility of parties claiming a 'legitimate interest' before access to the information is provided to them. There is therefore a concern about policing access by parties claiming a 'legitimate interest' in order to avoid opportunistic access, an issue that has been flagged up by the European Data Protection Supervisor (EDPS).⁵⁵ In addition, Member States may allow for wider access to register information which means that the transparency net can be cast even wider beyond those with a 'legitimate interest'.⁵⁶ The widening scope of accessibility brings with it the related question of balancing transparency with privacy and data protection which we turn to next.

(iii) Privacy and data protection concerns

A trustee owes a duty of confidentiality as a fiduciary. However, that confidentiality duty might be waived on public interest grounds or under compulsion of law. Some argue that there may be strong policy reasons for permitting disclosure on public interest grounds as the privacy that the trust form affords to settlors and beneficiaries can be used as a 'cloak for exploitation, corruption, and injustice'.⁵⁷ On the other hand, the growing call for increased financial transparency that is accompanied by greater disclosure of and access to confidential information about a trust causes tension with the fundamental notion of trust privacy. This also raises issues

⁵⁴ Revised 5AMLD, new para (4a) to Article 31 of the 4AMLD.

⁵⁵ European Data Protection Supervisor, 'Opinion on a Commission Proposal amending Directive (EU) 2015/849 and Directive 2009/101/EC: Access to beneficial ownership information and data protection implications' (Opinion 1/2017), available at https://edps.europa.eu/sites/edp/files/publication/17-02-02_opinion_aml_en.pdf accessed 1 July 2017.

⁵⁶ See n 54.

⁵⁷ Frances H. Foster, 'Trust Privacy' (2007-2008) 93 *Cornell L Rev* 555, 558. See also Knobel (n 45).

for the protection of the rights to privacy and data protection of individuals under the Data Protection Act 1998 and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The revised 5AMLD extends the collection of confidential beneficial ownership information from a targeted specific basis to a generalised one.⁵⁸ The generalised basis upon which personal data (beneficial ownership information) is being collected comes with the expansion of the policy purposes for such collection as well as the processing and use of the information. In terms of data protection, two connected principles merit further consideration. The first is the ‘purpose limitation’ principle and the other, the proportionality principle. The ‘purpose limitation’ principle is aimed at ensuring that personal data is collected for ‘specified, explicit and legitimate’ purposes.⁵⁹ The Data Protection Act 1998 echoes this principle by providing in data protection principle 2 that the collection of data has to be for ‘one or more specified and lawful’ purposes.

However, one concern with the revised 5AMLD is its attempt to cover policy purposes that go beyond anti-money laundering and countering financing of terrorism. There are other policy purposes captured by the inclusion of ‘associated predicate offences’ which may include offences, such as, tax evasion and financial crime. The lack of precision of the scope and extent of ‘associated predicate offences’ is further compounded by the fact that Member States have different legal definitions of some of these offences.⁶⁰ It further seeks to create a complex information-sharing network comprising different data controllers with different data processing purposes. This then raises an issue for the ‘purpose limitation’ principle of data processing when there is generalised collection of personal data which enables multiple and/or simultaneous processing of the data by different controllers and for different policy purposes that may not all be compatible.⁶¹ As the European Data Protection Supervisor (EDPS) states:⁶²

Processing personal data collected for one purpose for another, completely unrelated purpose infringes the data protection principle of purpose limitation and threatens the implementation of the principle of proportionality.

The revised 5AMLD, according to the EDPS, will cause uncertainty in terms of the purposes pursued and on the data controllers who are processing the data. That would in turn reduce data

⁵⁸ See n 32.

⁵⁹ Article 6(1)(b) of the Data Protection Directive 95/46/EC; Article 5(1)(b) of the General Data Protection Regulation (EU) 679/2016.

⁶⁰ Revised 5AMLD, recital (14a).

⁶¹ See EDPS (n 55) at paras. 29.

⁶² *Ibid*, para. 30.

protection safeguards, such as, the proportionality between processing personal data and the purposes of such processing.⁶³

On the other hand, the proportionality principle is a well-established principle which requires proportionality between the measure(s) taken that interfere with data protection and the purposes sought to be achieved. The proportionality issue raises further concerns. The first is the broad approach taken in the revised 5AMLD towards whose information should be collected and when that information is required to be disclosed and registered. While the 4AMLD clearly took a risk-based approach, the amendments proposed by the revised 5AMDL indicate that risk alone might not be sufficient and there are greater calls for ongoing monitoring of certain existing customers.⁶⁴ Risk aside, the revised 5AMLD does not provide clearer criteria for identifying which categories of customers would be caught. The second is the wider ‘intelligence based’ accessibility of FIUs to beneficial ownership information. As discussed above, the wider ‘unfettered’ access to be provided to FIUs would appear to extend and shift their processing of personal data from targeted investigation to intelligence gathering and data mining. This shift in turn raises questions about the proportionality of the measures contained in the revised 5AMLD as they allow greater interference with the privacy of personal data.

Thirdly, the reporting obligations contained in the revised 5AMLD relating to trusts will mean that more information will have to be reported about trusts regardless of whether they generate tax consequences and/or pose any effective risk to money laundering, terrorist financing or any other associated predicate offences. That, coupled with the creation of public central registers where access is given to not only law enforcement authorities and FIUs but also the public, albeit on a limited basis, may give rise to an increased potential for issues of proportionality to arise.

The EDPS, for instance, questions whether the wider access provided by the revised 5AMLD is indeed necessary. It argues that, if the policy objective of publicity of beneficial ownership information is about detecting and tackling money laundering, terrorist financing and other criminal activities, such as, tax evasion, in a timely and efficient manner, this might be equally done by ensuring that such information is transmitted to appropriate authorities, without the necessity for public access.⁶⁵ When public access to personal information is granted, there has to be careful consideration of the proportionality of the measures providing such access. It would seem that once a third party, albeit one with a ‘legitimate interest’, has access to the information,

⁶³ Ibid, para. (32).

⁶⁴ Revised 5AMDL, recital (19).

⁶⁵ See, e.g., ECJ judgment of 20 May 2003, in Joined Cases *Rechnungshof* (C-465/00) v *Österreichischer Rundfunk* and *Others* and *Christa Neukomm* (C-138/01) and *Joseph Lauermann* (C-139/01) v *Österreichischer Rundfunk*, para 88.

the confidential information is arguably within the public domain and thus loses its right to protection on the basis of confidentiality. This might be problematic given the lack of clarity in the revised 5AMLD in terms of the myriad purposes for processing the data and who amongst multiple data controllers should be held accountable. These privacy concerns have therefore led the EDPS to express deep concerns about the scope of the revised 5AMLD and its significant potential to infringe individuals' rights of data protection and privacy on the grounds of proportionality.⁶⁶

Conclusion

The increasing commercial use of trusts for wealth management and asset protection has undoubtedly raised concerns about the potential for the use and abuse of trusts for money laundering, financing terrorism and other financial crimes, such as tax evasion. When high-profile cases of money laundering or tax evasion are reported in the media, those stories give strength to the moral and ethical arguments made for greater transparency and regulation of trusts. The 4AMLD and the subsequent amendments proposed by the revised 5AMLD are a reflection of the increasing pressure globally for greater financial transparency. The revised 5AMLD is an ambitious project that seeks to provide greater transparency of both corporate entities and trusts and to extend the reporting obligations of parties, such as, trustees. It attempts to further align trusts with corporate entities by imposing the requirement for the maintenance of a central register for beneficial ownership information on trusts which is accessible to the public, albeit on a limited scale. These measures will result in trusts losing some degree of privacy.

There are terminological issues that arise in the 4AMLD and revised 5AMLD, as well as the Money Laundering Regulations 2017. Firstly, the choice of the term 'beneficial ownership' is less than ideal as it is being used as a shorthand to capture the interests of various parties to the trust which may be quite different and are not necessarily ownership rights. Not all of the rights of the parties defined as 'beneficial owners' fit neatly with orthodox understanding of 'beneficial ownership'. It would be useful for sharper distinctions to be made between various rights, whether personal or proprietary in nature, of these so-called 'beneficial owners'. In addition, distinctions should further be made between ownership and control. This might help to marked out more clearly what particular types of information about the trust should be reported and

⁶⁶ See EDPS (n 55).

when in order to ensure the qualitative usefulness of that information. Secondly, conceptual uncertainty equally arises in relation to the meaning of 'legitimate interest'. While the revised 5AMLD leaves the matter of defining 'legitimate interest' within national laws to Member States, different meanings may be adopted. That can lead to legal and conceptual uncertainty about the scope and extent of public access which can in turn undermine the objective of increasing global transparency and facilitating more efficient sharing of financial information between states.

The expansion of the reporting obligations and the overall policy purposes, both expressly and implicitly stipulated, in the revised 5AMLD has the further potential of raising privacy and confidentiality concerns. This is particular true of the revised 5AMLD's broader objective of sanctioning FIUs' wider access to beneficial ownership information for the purposes of intelligence gathering and analysis. That, coupled with the broader policy purposes of the revised 5AMLD that extends beyond anti-money laundering and countering terrorist financing to 'associated predicate offences', adds to the concerns of privacy of individual's information. The revised 5AMLD permits not only more information to be gathered but also for that information to be used for multiple purposes and by multiple parties. The collection and access to personal information on a generalised rather than specific targeted manner will certainly give rise to conflicts with existing data protection principles. Greater clarity is therefore needed as to when and how central register information may be appropriately processed and used, including by the public, and which parties are to be accountable.