15 May 2019

MLD 5: HMT consultation on UK transposition

On 15 April 2019, H.M. Treasury published a consultation paper seeking views on the transposition of the Fifth Money Laundering Directive (**MLD 5**) in the UK. Transposition in the UK will happen on **10 January 2020**.

Transposition will involve amendments to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the **MLRs**). However, the consultation paper does not include any specific textual amendments and, at this stage, the proposed changes are explained by way of narrative description only.

Although the consultation is obviously primarily driven by the requirement to transpose MLD 5, it is clear that, in certain cases, the government is minded to go beyond what is strictly required for the transposition of MLD 5. For instance, the proposals take into account recent FATF recommendations.

We reported on the key changes that MLD 5 will introduce in our briefing note of June 2018. In this briefing, we address how the government now says it intends to transpose some of these changes, highlighting areas where there may be a degree of gold-plating and where there are proposals not directly driven by MLD 5.

KEY POINTS

- The consultation closes on **10 June 2019** – the Treasury encourages the industry to respond with evidence as to what their proposals could mean in practice.
- MLD 5 will be transposed in the UK on **10 January 2020** by way of amendments to the MLRs.
- Not all the changes that the government proposes are specifically driven by MLD 5 – some are to give effect to FATF Recommendations
- CDD will be more burdensome in terms of some granular changes but overall the changes should be incremental and, while policies, practices and procedures will need to be updated before transposition, this should be manageable.
- Firms will need to take account of a new set of mandatory prescribed EDD measures – the government seeks comments with regard to how it can transpose the requirements in a proportionate way.
- The requirement for firms to report discrepancies in beneficial ownership information may be onerous.
- The number of UK trusts that will need to be registered will increase substantially – a definition of "express trust" may be required.

The consultation provides an opportunity for firms and their industry bodies to make representations at a time when the proposals are still expressed as high-level statements of policy intent rather than specific legal drafting, with the government open to views about the practicalities and costs implications of the proposals and having time to give effect to changes. The government specifically encourages firms and industry to provide as much evidence as possible, which will help to shape its policy decisions.

DEADLINE FOR COMMENTS AND NEXT STEPS

The consultation period closes on **10 June 2019**.

Although the consultation paper does not mention this, we would expect the government to consult again on the terms of the draft legal instrument once it has processed the responses to this consultation (although, as was the case with MLD 4, this may be last minute and not fully public, with only a short window within which to make comments).

The government has confirmed that MLD 5 will be transposed by way of amendments to the MLRs with effect from **10 January 2020**. Brexit will not affect this.

THE HEADLINES

Customer Due Diligence

- MLD 5 will impose a new requirement, where a customer is on the beneficial ownership register, for the firm to collect proof of such registration or an excerpt of the register when entering into a new business relationship – the government proposes to transpose this requirement as is but will clarify that it will not have retrospective effect (so that it will not be necessary to collect such proofs/excerpts in relation to pre-existing customers as of 10 January 2020) – see Annex 2, Item 2.

- When conducting CDD measures in relation to a customer constituted as a body corporate, firms will be *required* to identify and verify the names of senior management (currently the MLRs require firms to take "reasonable measures" to do this). The government is following a FATF Recommendation in this regard, rather than transposing an MLD 5 requirement – see Annex 2, Item 3.

- Where, when carrying out CDD measures in relation to a body corporate, a firm has exhausted all possible means to identify the beneficial owner and there are no grounds for suspicion, the person who holds the position of senior managing official is the beneficial owner; MLD 5 will introduce a new requirement for the firm to take the reasonable measures to verify the identity of that person. The government proposes to transpose this requirement in line with MLD 5 – see Annex 2, Item 4.

- Whereas it is currently a requirement to take "*reasonable measures*" to understand the ownership and control structure of a customer that is beneficially owned by another person, the government proposes to convert this into an absolute obligation (again, following a FATF Recommendation rather than in transposition of an MLD 5 requirement) – see Annex 2, Item 5.

- In addition to refreshing CDD measures in relation to existing customers on a risk sensitive basis or where the customer's circumstances changes, firms will also need to do this where UK law requires them to contact the customer for the purposes of reviewing any relevant information relating to the beneficial owners of the customer or if they have this duty under the UK's International Tax Compliance Regulations 2015 – see Annex 2, Item 7.

- MLD 5 will introduce a new set of prescribed, mandatory enhanced due diligence measures that firms must carry out in relation to business relationships or transactions "*involving*" high risk third countries. The government is seeking views as to how this mandatory list of measures might be transposed into UK law in a "proportionate and effective" way, suggesting that there may be some flexibility here and not simply a "copy out" – see Annex 2, Item 8.

PEPs

- The UK is required to issue and keep up-to-date a list which indicates the "*exact*" functions which qualify as prominent public functions (for the purposes of identifying PEPs); the government will follow the same approach that has been adopted by the FCA in its PEP Guidance in terms of identifying the relevant prominent public functions and will spell these out exhaustively – see Annex 3, Item 1.

Mechanisms to report discrepancies in beneficial ownership information

- In terms of beneficial ownership information, in what may prove to be a disproportionately onerous obligation depending on how the legal instrument is drafted, firms will be required to report any discrepancies they discover between the information they hold and the information on the PSC Register; the government proposes that such reporting will be to Companies House, via a yet-to-be launched "bespoke reporting mechanism" – see Annex 4, Item 1.

Registration of trusts

- A large number of express trusts which to date have not been under an obligation to register with HMRC's Trust Registration Service (i.e. because they do not generate UK tax consequences) will have to do so in future. Unregistered trusts in existence as of 10 March 2020 will have until 31 March 2021 to register. New express trusts will have to register within 30 days of their creation. Although the government says its hands are tied with regards to granting any exemptions, it accepts that trusts are used for a variety of purposes in the UK, including for charitable purposes, commercial purposes and when structuring pension schemes. It will take this into account when determining its approach and says that it wants to apply the registration process proportionately. In addition, the government recognises that express trusts are widely used in the UK in circumstances that would be essentially contractual in civil law jurisdictions in other Member States and is therefore "willing to explore the possibility of having regard to the way such trusts would be dealt with in other Member States when clarifying registration requirements". This statement of approach from the government perhaps provides some comfort given that the registration requirement could prove to be disproportionately burdensome for a number of UK trusts, particularly those that are used widely in the financial markets as legitimate and efficient legal devices designed to reduce systemic and other risks (e.g. those associated with settlement and other financial markets activities). These so-called "financial markets trusts" are generally special purpose trusts which are used to enhance market confidence in the completion of settlement and/or the holding of securities. They help to support the safe and efficient operation of financial market infrastructures, do not generate UK tax consequences and are very far removed from the types of trust and their higher risk of money laundering and terrorist financing which the legislation is primarily targeting – see Annex 4, Item 2.

- Although, as mentioned above, the government notes that MLD 5 requires the UK to register all UK resident "express trusts" and does not provide scope for carve outs, exemptions or *de minimis* thresholds, it does nonetheless request views on its proposed approach to the definition of such express trusts. In the consultation paper, it says that the term "express trust" is generally defined as a trust that was expressly (i.e. deliberately) created by a settlor, as opposed to being created in other ways – for example, through a court order or through statute. This tallies with what H.M. Treasury previously said when transposing MLD 4- i.e. that the term should be taken to mean a trust that has been deliberately created by a settlor who is transferring property to a trustee for a valid purpose and it does not include a "statutory, resulting or constructive trust". However, MLRs do not currently define "express trust". With the removal of the requirement for there to be UK tax consequences, and the potential for many more trusts to become registrable, it is likely to prove necessary to reflect the government's stated definition of "express trust" in the MLRs (or at least in clear guidance from, for example, HMRC) – see Annex 4, Item 2.

- Although persons with a "legitimate interest" will be able, on request, to access the information on the Trust Registration Service, the government wishes to define this narrowly – see Annex 4, Item 4.

Bank Account Register

- Firms should note that banks and other payment providers will be required to include certain information on a register in relation to any individuals or firms holding or controlling bank accounts and payment accounts and that such information will be available to FCA, NCA, SFO, HMRC, Companies House, the police and others for the purposes of criminal and civil recovery investigations and asset recovery investigations – see Annex 5, Item 1 and Item 2.

Groups

- Firms which are part of a group are already required to establish and maintain policies, controls and procedures throughout the group for data protection and sharing information; however, the government proposes to amend the MLRs in line with a FATF recommendation so that there would be a specific additional obligation to have policies requiring customer, account and transaction information to be provided to the firm from its branches and subsidiaries – see Annex 7, Item 1.

The payments instrument derogation

- The thresholds that form part of the CDD exemption for low risk e-money products (i.e. the payments instrument derogation) will be lowered and credit institutions and financial institutions acting as acquirers will only be able to accept payments carried out with anonymous prepaid cards issued in third countries where such cards satisfy the amended payments instrument derogation) – See Annex 1, Item 1.

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ANNEX 1

BANKS, PAYMENTS AND ELECTRONIC MONEY

MLD 5 CHANGES (TO MLD 4)	HMT COMMENTARY ON PROPOSED AMENDMENTS TO MLRs
1. PAYMENT INSTRUMENT DEROGATION – LIMITS REDUCED	
• The thresholds for CDD exemption for low risk e-money products will be lowered. For the exemption to apply, all of the following conditions must be met: - the amount that can be stored electronically must not exceed €150 (down from €250); - the payment instrument must either not be reloadable or have a maximum limit on monthly payments of €150 (down from €250) which can only be used in the Member State of issue; - the payment instrument must be used exclusively to buy goods and services; - anonymous e-money must not be used to fund the payment instrument; and - any redemption in cash or cash withdrawal must not exceed €50 (down from €100) and any remote payment transaction must not exceed €50 per transaction.	• The government is currently minded to transpose the revised requirements exactly, subject to any evidence collected through the consultation which causes a rethink – the government invites such evidence.
2. ACQUIRERS – RESTRICTION ON ANONYMOUS PREPAID CARDS ISSUED IN THIRD COUNTRIES	
• Credit institutions and financial institutions acting as acquirers may only accept payments carried out with anonymous prepaid cards issued in third countries where such cards meet the derogation criteria set out above – i.e. where the national law in the third country is deemed to be equivalent; • Member States have the discretion to prohibit the acceptance of *any* payments made by such anonymous cards.	• The government is currently minded to transpose the revised requirements exactly, subject to any evidence collected through the consultation which causes a rethink – the government invites such evidence. • The government queries whether it should allow anonymous paid cards issued in third countries (i.e. whether it should exercise its discretion to ban them outright).

ANNEX 2

CUSTOMER DUE DILIGENCE (CDD)

MLD 5 CHANGES (TO MLD 4)	HMT COMMENTARY ON PROPOSED AMENDMENTS TO MLRs
1. ELECTRONIC IDENTIFICATION AND VERIFICATION	
• MLD 5 clarifies that verifying a customer's identity on the basis of documents, data or information obtained from a reliable and independent source can include, where available, electronic identification means, relevant trust services (as defined in Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions) or other secure, remote or electronic identification process regulated, recognised, approved or accepted by the relevant national authorities.	• The government welcomes views on whether there should be additional clarification in the MLRs or in guidance as to what constitutes "secure" electronic identification processes. • The government is of the view that the requirement for an alternative process to be "regulated, recognised, approved or accepted" by a national competent authority does not necessitate formal recognition – approval can be implicit. The government queries whether standards on an electronic identification process set out in HMT-approved guidance (e.g. JMLSG Guidance Notes) would constitute implicit recognition.
2. COLLECTING PROOF OF REGISTRATION/EXCERPT FROM BENEFICIAL OWNERSHIP REGISTER	
• When entering into a new business relationship with a corporate or other legal entity, or a trust or a legal arrangement having a structure or functions similar to trusts … which are subject to the registration of beneficial ownership information … obliged entities shall collect *proof of registration* or an *excerpt of the register*.	• The government proposes to transpose this requirement by amending Regulation 30(2) MLRs (timing of verification) which currently provides that firms must verify the identity of a customer before the establishment of a business relationship or the carrying out of a transaction. • However, this amendment will not have retrospective effective and will *not* require firms to collect proof of registration or an excerpt from the register in relation to business relationships in existence before 10 January 2020.
3. BODIES CORPORATE: REQUIREMENT TO DETERMINE AND VERIFY NAMES OF SENIOR MANAGEMENT	
• N/A	• This is not an MLD 5 transposition requirement. • The government is proposing to follow a FATF recommendation (Recommendation 10.9) imposing a *requirement* to identify and verify the names of senior management of a body corporate. • Currently, Regulation 28(3)(b) MLRs requires relevant persons to take "*reasonable measures*" to determine and verify the law to which the body corporate is subject, its constitution and the full names of the board of directors (or equivalent management body) • The government proposes that firms should be *required* to do this.
4. BODIES CORPORATE: REQUIREMENT TO IDENTIFY SENIOR MANAGING PERSON WHERE BENEFICIAL OWNER CANNOT BE IDENTIFIED	
• Where, in the case of a corporate entity, a relevant person has exhausted all possible means and provided there are no grounds for suspicion, the beneficial owner is the person who holds the position of senior managing official (MLD 4) – MLD 5 will introduce a new requirement for obliged entities to take the necessary reasonable measures	• The government proposes to amend Regulation 28(8) MLRs in line with this enhanced requirement.

MLD 5 CHANGES (TO MLD 4)	HMT COMMENTARY ON PROPOSED AMENDMENTS TO MLRs
to *verify the identity* of that person and to keep records of the actions taken as well as any difficulties encountered during the verification process.	
5. UNDERSTANDING THE OWNERSHIP AND CONTROL STRUCTURE OF CUSTOMERS	
• N/A	• This is not an MLD 5 transposition requirement • The government proposes to amend Regulation 28(4)(b) which currently requires firms to take "reasonable measures" to understand the ownership and control structure of a legal person (etc) that is beneficially owned by another person – the words "reasonable measures" would be deleted making it an absolute requirement. • The government seeks views as to what extent firms already do this.
6. INABILITY TO CONDUCT CDD - REQUIREMENT TO CEASE TRANSACTIONS	
• N/A	• This is not an MLD 5 transposition requirement. • Regulation 31 MLRs currently provides that where a firm is unable to apply CDD measures in Regulation 28, they must not carry out any transaction and must consider whether they have to make a suspicious activity report (SAR) • The government is consulting on whether to extend this to apply to situations where: - a credit institution or financial institution is unable to apply the additional CDD measures required by Regulation 29; and/or - any firm is unable to apply enhanced CDD measures where required.
7. REFRESHING CDD MEASURES – LEGAL DUTY TO CONTACT CUSTOMER	
• In addition to the existing obligation to re-apply CDD measures to existing customers on a risk-sensitive basis or when the relevant circumstances of the customer changes, obliged entities will also be required to apply CDD when they have a legal duty to contact the customer for the purposes of reviewing any relevant information relating to the beneficial owner(s) of the customer, or if they have this duty under the Directive 2011/16/EU (the EU Directive on administrative cooperation in the field of taxation, often referred to as "DAC").	• The government proposes to amend Regulation 27(8) MLRs to reflect the MLD 5 change. • The amendment will refer to the firm having a duty under the UK International Tax Compliance Regulations 2015 (as amended)(these transposed DAC). • The government interprets "legal duty" to mean where UK law requires firms to contact a customer for the purpose of reviewing any information which is relevant to the risk assessment carried out in respect of that customer for CDD purposes *and* which relates to the beneficial ownership information of that customer. • It will be for firms to determine what is "relevant information" relating to the beneficial owner. • This requirement will only apply where the customer is not an individual.
8. HIGH-RISK THIRD COUNTRIES – ENHANCED DUE DILIGENCE	
Designated high-risk third countries	

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• The designated high-risk third countries are those listed in the European Commission's most recent Delegated Regulation (EU) 2016/1675 as amended from time to time (most recently by Delegated Regulation (EU) 2018/1467)	• The government says (somewhat optimistically) that the EU list will continue to have legal effect in the UK during the "implementation period", and that "following the implementation period", the UK Sanctions and Anti-Money Laundering Act 2018 will provide the UK with the necessary powers to maintain its own list of high-risk third countries.
Mandatory EDD measures	
• MLD 5 expands the scope of persons on whom obliged entities must conduct EDD from "natural persons or legal entities *established* in" high-risk third countries to "business relationships or transactions *involving* high-risk third countries".	• The government notes that MLD 5 does not directly define what "involving" means and appears to accept that there should be such a definition. It seeks evidence as to whether having a broad definition of "involving" would create problems. At the very least, the government intends to narrow the definition so that UK citizens who are also nationals of high-risk countries should not be subject to EDD merely because of that connection.
• MLD 5 lists a number of specific EDD measures which must be carried out in relation to business relationships or transactions involving high-risk third countries. These involve *all* of the following: - obtaining additional information on the *customer* and on the *beneficial owner(s)*; - obtaining additional information on the *intended nature of the business relationship*; - obtaining information on the *source of funds and source of wealth* of the customer *and* of the beneficial owner(s); - obtaining information on the *reasons* for the intended or performed transactions; - obtaining the *approval of senior managers* for establishing or continuing the business relationship; - conducting *enhanced monitoring* of the business relationship by increasing the number and timing of the controls applied; - selecting patterns of transactions that need further examination.	• The government seeks views as to how the mandatory list of measures might be transposed in a "proportionate and effective" way.
• In addition to the above, MLD 5 gives Member States the discretion to require obliged entities to ensure that the first payment is carried out through an account in the customer's name with a credit institution subject to CDD standards that are "not less robust" than those laid out in MLD 5.	• The government will not transpose this optional requirement.
• In addition to the mandatory EDD measures listed above, obliged entities will be required to apply, *where applicable*, at least one of the following measures when carrying out transactions involving high-risk third countries: - applying additional elements of due diligence; - introducing enhanced relevant reporting mechanisms or systematic reporting of financial transactions;	• Since the application of at least one of the measures will only be required "where applicable", the government will place the onus on firms to determine which requirements are necessary based on their risk assessments.

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- limiting business relationships or financial transactions with natural persons or legal entities from the identified high risk third country. ***Member State mitigating measures*** • In addition to the above, the UK government and supervisory authorities will be required to apply, *where applicable*, one or more additional mitigating measures to persons and legal entities carrying out transactions involving high-risk third countries. These shall consist of one or more of the following: - *refusing the establishment of subsidiaries or branches* or representative offices of financial institutions from the country concerned (or otherwise taking into account the fact that the relevant obliged entity is from a country that does not have adequate AML/CFT regimes; - *prohibiting obliged entities from establishing branches or representative offices* in the country concerned, or otherwise taking into account the fact that the relevant branch or representative office would be a country that does not have adequate AML/CFT regimes; - requiring *increased supervisory examination* or increased *external audit requirements* for branches and subsidiaries located in the country concerned; - requiring *increased external audit requirements for financial groups* with respect to any of their branches and subsidiaries located in the country concerned; - requiring credit and financial institutions to review and amend or if necessary terminate, *correspondent relationships* with respondent institutions in the country concerned.	• Since the application of at least one of the additional mitigating measures will only be required "where applicable", the government will place the onus on the supervisory authorities to determine which requirements are necessary based on their assessment of risk.

ANNEX 3

POLITICALLY EXPOSED PERSONS (PEPs)

MLD 5 CHANGES (TO MLD 4)	HMT COMMENTARY ON PROPOSED AMENDMENTS TO MLRs
1. LIST OF PROMINENT PUBLIC FUNCTIONS	
• Each Member State will be required to issue and keep up-to-date a list indicating the exact functions which qualify as prominent public functions.	• The government intends to adopt the approach already taken by the FCA in identifying prominent public functions (i.e. as set out in FG17/6, the July 2017 guidance on the treatment of PEPs – see in particular, paragraphs 2.16 to 2.20). This would mean that the following UK functions would appear on an *exhaustive* list as prominent public functions: - members of the UK government, and members of the devolved administrations in Scotland, Wales and Northern Ireland; - members of the UK parliament, and members of the Scottish Parliament, Welsh Assembly and Northern Irish Assembly; - members of the national governing bodies of political parties represented in any of the UK Parliament, Scottish Parliament, Welsh Assembly and Northern Irish Assembly (but only where they exercise significant power (e.g. over the selection of candidates or distribution of significant party funds)); - Justices of the UK Supreme Court; - members of the Court of the Bank of England; - Ambassadors, Permanent Secretaries/Deputy Permanent Secretaries (it will not normally be necessary to treat public servants below Permanent or Deputy Permanent Secretary as having a prominent public function), and officers holding the equivalent military rank (Lieutenant General, Air Marshal, Vice Admiral or more senior); - board members of for-profit enterprises in which the State has an ownership interest of 50% or more, or where reasonably available information points to the State having control over the activities of the enterprise; - directors, deputy directors and board members of international public organisations headquartered in the UK – in line with the FCA Guidance, the government is minded to conclude that an "international organisation" is one that is *intergovernmental* (e.g. the UN or NATO) rather than, e.g., and international sporting federation or a non-governmental organisation in receipt of public funds

ANNEX 4

REGISTERS OF BENEFICIAL INTERESTS

MLD 5 CHANGES (TO MLD 4)	HMT COMMENTARY ON PROPOSED AMENDMENTS TO MLRs
1. MECHANISMS FOR REPORTING DISCREPANCIES (CORPORATE REGISTER)	
• Member States shall require the information held in the central register of beneficial ownership is adequate, accurate and current and shall put in place *mechanisms* to achieve this including by imposing a positive reporting obligation on obliged entities and, if appropriate and to the extent that this requirement does not interfere unnecessarily with their functions, competent authorities to report any discrepancies they find between the information held on the central register and the information that is available to them. In the case of reported discrepancies, Member States are required to ensure that appropriate.	• The government suggests that where a firm notices a discrepancy between the beneficial ownership information it holds and that on the PSC Register, it could be required to report this to Companies House through a "*bespoke reporting mechanism*". The proposal is light on detail (and presumably the "mechanism" would be clarified by Companies House), but the government says that the report could include detail of the name of the reporting individual and their firm, together with the nature of the discrepancy. Companies House (which the government considers best placed to deal with reports of discrepancies) would then investigate the discrepancy, in all likelihood notify the relevant company and seek and amendment to the information on the PSC Register. • As regards competent authorities, the government is of the view that they could report any discrepancies directly to Companies House, without interfering unnecessarily with their functions and without jeopardising ongoing investigations of prosecutions.
2. TRUSTS AND THE TRUST REGISTRATION SERVICE	
• Member States shall require that the beneficial ownership information of *express* trusts and similar legal arrangements which are *administered* in the UK– regardless of whether or not the trust has generated a UK tax consequence (the current trigger for registration ("when the trust generates tax consequences") will be removed) - shall be held in a central beneficial ownership register set up by the Member State where the trustee of the trustee or person holding an equivalent position in a similar legal arrangement is established or resides. • Where the place of establishment or residence of the trustee of the trust or person holding an equivalent position in a similar legal arrangement is outside the EU, the information shall be held in the central register of the Member State where the trustee of the trust (or similar) enters into a business relation or acquires real estate in the name of the trust (or similar).	• The removal of the UK tax consequences trigger means that the following trusts will need to be registered under the MLRs as amended: - *all* UK resident express trusts (i.e. where all the trustees are UK resident or where there is a mixture of UK and non-UK trustees but the settlor is a UK resident)(but see below with regards to what "express trust" means); - non-EU resident express trusts that acquire UK land or property on or after 10 March 2020; - non-EU resident express trusts that enter into a new business relationship with a UK obliged entity on or after 10 March 2020 which is expected to have an element of duration (the government's view is that a non-EU resident express trust receiving services on an ongoing basis for a UK obliged entity, where the trust is deemed to be administered in the UK because it has one UK-resident trustee and where the expected duration of the relationship is 12 months or more will be required to register on the Trust Registration Service). • The government notes that MLD 5 gives it little room for manoeuvre in this regard: the UK is required to register all UK resident "*express trusts*" (see below) and there are no carve outs, exemptions or *de minimis* thresholds. Consequently it is not (currently) proposing any. • However, the government: - recognises that one of the findings of the HMT/Home Office National risk assessment of money laundering

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	and terrorist financing 2017 was that UK trusts present a low risk of money laundering and terrorist financing; - is therefore keen to ensure that the registration process is applied *proportionately*; - recognises that trusts are used for a variety of purposes in the UK (including for charitable purposes, to protect assets for children and vulnerable adults, ring-fending funds for consumer protection purposes, commercial purposes (such as providing security for contracts) or when structuring pension schemes) and *its approach will take this into account*, as will future guidance on the Trust Registration Service; - is considering whether there are other registration services already in existence for particular trust types that could meet the MLD 5 registration requirement. • In addition, the government specifically asks for views on its proposed approach to the definition of "express trusts" (which, with the removal of the UK tax consequences trigger for registration, will assume an even greater significance). There is currently no such definition in the MLRs, but the government's view is that the term "express trust" is generally defined as a trust that was expressly (i.e. deliberately) created by a settlor, *as opposed to being created in other ways* (for instance by a court order or through statute). (It previously indicated, at the time of MLD 4 transposition, that in its view statutory, resulting or constructive trusts are not caught.) Respondents are asked to provide named examples of specific types of trusts that they think ought not to be caught and their preferred definition. • The government clarifies that all trusts that *do* generate a UK tax consequence (*even if they are not express trusts* or are non-EU resident express trusts that do not have any UK trustees) will still need to register on the Trust Registration Service. • In terms of data collection: - the government may choose to collect some additional information (i.e. addition to the information prescribed by MLD 4) with which to establish the legal identity of individuals, such as National Insurance or passport numbers; - the government may collect some additional information in respect of non-EU trusts that are required to register; - the government will confirm its approach in a more detailed HMRC technical consultation to be published later in 2019 (which will include additional information on data collection, data sharing and the imposition of penalties; - the government expects that, despite the widening of the trust registration requirement, it will nonetheless continue to collect more information on trusts which generate tax consequences compared to trusts which do not; - however, the government will be looking again at the level of information currently required for the existing Trust Registration Service, which some have found

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	onerous, with a view to reducing the amount of information which trustees are required to register. • In relation to the deadline for registering with the Trust Registration Service: - the current deadline of 31 January will be removed; - for trusts already in existence on 10 March 2020 but not yet registered, a registration deadline of 31 March 2021 is proposed; - trusts created on or after 1 April 2020 will have to be registered within 30 days of their creation. - it is not clear what the intention is as regards any trusts created after 10 March 2020 but before 1 April 2020 – there may be a typographical error in the dates provided in the consultation paper. • The government will be consulting separately on the penalties for late registration.
3. TRUSTS AND DATA SHARING WITH OBLIGED ENTITIES	
• When entering into a new business relationship with a … trust or similar legal arrangement which is subject to the registration of beneficial ownership information, the obliged entity shall collect *proof of registration* or an *excerpt of the register*.	• The government's view is that the onus is on the trustee to provide such proof of registration or excerpt to the obliged entity. It proposes that the obliged entity is best placed to verify that the relevant trustee has registered the trust on the Trust Registration Service by obtaining such proof of registration or excerpt from the register and that the alternative of allowing the obliged entity to request the information direct from the trust register would be less efficient. • The type of information that the trustee will be required to provide to the requesting obliged entity will be detailed in the HMRC's technical consultation later in 2019, although it will likely include information on the trustees including their names and contact details as well as the trust registration number. • The method by which the trustee will be able to obtain the requisite proof of registration/excerpt will also be detailed in the same HMRC technical consultation, although it will likely involve the trustee being able to print an extract.
4. TRUSTS AND DATA SHARING WITH THOSE WITH A LEGITIMATE INTEREST	
• Member States shall ensure that information on the beneficial ownership of a trust or a similar legal arrangement is accessible in all cases to (amongst others): - any natural or legal person that can demonstrate a legitimate interest; • Member States should define legitimate interest, both as a general concept and as a criterion for accessing beneficial ownership information in their national law.	• It is for the UK government to define legitimate interest. • The government recognises the potential risks associated with over-sharing data and suggests that this should be narrowly drawn and tied to the purpose of MLD 5 in combatting money laundering and terrorist financing. • The government considers that someone who has a legitimate interest in the data will: - have active involvement in AML/CFT activity; - have reason to believe that the trust or individual that is the subject of the legitimate interest enquiry is involved with money laundering or terrorist financing; - have evidence substantiating that belief. • The government will be setting out a process by which it will consider legitimate interest requests "in due course", but this is likely to include a requirement to see identification documents in relation to the requesting party together with evidence linking the trust or individual

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	in respect of whom the request is being made to concerns about money laundering or terrorism financing.
5. TRUSTS AND DATA SHARING WITH ANYONE IN RELATION TO CONTROLLING TRUSTS	
• Member States shall ensure that information on the beneficial ownership of a trust or a similar legal arrangement is accessible in all cases to (amongst others): - any natural or legal person that files a written request in relation to a trust or similar legal arrangement which holds or owns a controlling interest in any corporate or other legal entity other than those referred to in Article 30(1)(i.e. is not registered on any EEA Member State's corporate beneficial ownership register), through direct or indirect ownership, including through bearer shareholdings, or through control via other means.	• The government proposes to define "controlling interest" in line with MLD 4 and The Register of People with Significant Control Regulations 2016 (PSC Regulations) and the associated Guidance for People with Significant Control 2017 (PSC Guidance). • Under this definition, a trust will be deemed to hold a controlling interest in any corporate entity (including a PLC) or "other legal entity" (including unincorporated associations, NGOs, collective investment schemes, trusts): - when the trust has 25% or more of voting shares or equivalent voting rights in respect of the entity; - where the trust has any of the other means of control as defined in the PSC Guidance. • The government is considering different options as to how to identify trusts falling within the above definition. Its preferred option is to require a simple self-declaration by the relevant trustee as to whether the trust meets the definition. Alternatively, it might require trustees to provide detailed evidence showing that they hold or own a controlling interest.

ANNEX 5

NATIONAL REGISTER OF BANK ACCOUNT OWNERSHIP

MLD 5 CHANGES (TO MLD 4)	HMT COMMENTARY ON PROPOSED AMENDMENTS TO MLRs
1. WHO WILL NEED TO SUBMIT INFORMATION?	
• Member States shall put in place centralised automated mechanisms, such as central registries or central electronic data retrieval systems, which allow the identification, in a timely manner, of any natural or legal persons holding or controlling payment accounts and bank accounts identified by IBAN, as defined by Regulation (EU) No. 260/2012 (establishing technical and business requirements for credit transfers and direct debits in euro) and safe-deposit boxes held by a credit institution within their territory.	• The government's view is information would need to be submitted by: - UK-incorporated credit institutions, UK-incorporated payment institutions and UK branches of non-UK credit institutions, providing ownership information of bank and payment accounts identified by IBAN; - UK-incorporated credit institutions, and UK branches of non-UK credit institutions, providing ownership information of safe-deposit boxes held within the UK. • The government seeks views as to whether it should also require the following to submit ownership information: - UK-incorporated credit and payment institutions which issue credit cards; - e-money issuers which issue prepaid cards; - credit unions and building societies which issue accounts not identified by IBAN.
2. WHAT INFORMATION SHOULD BE INCLUDED ON THE REGISTER?	
• The following information shall be accessible and searchable through the centralised mechanisms referred to above: - for the customer-account holder *and any person purporting to act on behalf of the customer*: the name complemented by either the other identification data required under the national provisions transposing Article 13(1)(a) (i.e. identification and verification for CDD purposes) or a unique identification number; - for the beneficial owner of the customer-account holder: the name, complemented by either the other identification data required under the national provisions transposing Article 13(1)(b) (i.e. identification and verification of identity of a beneficial owner for CDD purposes) or a unique identification number; - for the bank or payment account: the IBAN number and the date of account opening and closing; - for the safe-deposit box: name of the lessee complemented by either the other identification data required under the national provisions transposing Article 13(1) (i.e. identification for CDD purposes) or a unique identification number and the duration of the lease period. • Member States may consider requiring other information deemed essential for FIUs and	• The government says MLD 4 as amended by MLD 5 is not clear as to the precise nature of the identifying information to be included on the bank account register and therefore is seeking views on its following suggestions: - information on *natural persons* holding bank accounts, payment accounts or safe-deposit boxes should consist of: - the person's name; - the person's address and date of birth; - a unique identifier – e.g. passport number and/or national insurance number; - information on *legal persons* holding bank accounts, payment accounts or safe-deposit boxes should consist of: - the registered name of the legal entity; - its registered company number (or equivalent) - the names of the ultimate beneficial owner(s) - unique identifying numbers provided by the submitting institution for the beneficial owner(s) – e.g. passport numbers and/or national insurance numbers - information held on bank and payment accounts contained on the register should consist of: - the IBAN numbers of such accounts; - the day, month and year on which they were opened/closed (but only accounts that are open on 10 January 2020, or which are newly opened after that date, need to be registered – i.e. there is

MLD 5 CHANGES (TO MLD 4)	HMT COMMENTARY ON PROPOSED AMENDMENTS TO MLRs
competent authorities for fulfilling their obligations.	no need to register accounts which closed prior to 10 January 2020). - information held on safe-deposit boxes should consist of the duration of the lease period (in addition to the above); - if the decision is take to include them on the register (see above), information on credit cards, prepaid cards and/or accounts issued by credit unions or building societies that are not identified by IBAN should consist of the same information required in relation to natural and legal persons holding bank accounts, payment accounts or safe-deposit boxes.
3. ACCESS TO INFORMATION ON THE BANK ACCOUNT REGISTER	
• Member States shall ensure that the information held in the centralised mechanisms (i.e. register) is directly accessible in an immediate and unfiltered manner to national FIUs. The information shall also be accessible to national competent authorities for fulfilling their obligations	• The government is seeking views on its proposed approach to granting access to the bank account register: - information on the register will be available ***to***: FCA; National Crime Agency; Serious Fraud Office; the police; HMRC; Companies House; - information on the register will be accessible ***for the purposes of***: criminal investigations, civil recovery investigations; asset recovery investigations; strategic intelligence collection; - within those organisations to whom the information will be available for the specified purposes (see above) internal dissemination should be on a need-to-know basis, with access being limited only to accredited financial investigators and financial intelligence officers records with records and audit trails being maintained of those who have access to the register
4. SUBMISSION OF INFORMATION BY RELEVANT BANKS, PAYMENT INSTITUTIONS ETC.	
• Not specified.	• The government proposes that the obligation on the part of relevant banks and others to submit information will arise weekly, although there will be no obligation to re-submit data which has not changed since the previous submissions. • The government seeks views on an alternative approach under which the owner of the register would obtain the requisite information direct from the banks and others required to submit information.

ANNEX 6

PREPARING FOR NEW TECHNOLOGIES

MLD 5 CHANGES (TO MLD 4)	HMT COMMENTARY ON PROPOSED AMENDMENTS TO MLRs
1. NEW PRODUCTS, PRACTICES AND DELIVERY MECHANISMS	
• N/A	• This is not an MLD 5 transposition requirement. • FATF Recommendation 15.2 states that financial institutions should be required to undertake risk assessments prior to the launch or use of new products, new business practices and delivery mechanisms. • Regulation 19(4)(c) MLRs currently requires firms to have policies, controls and procedures which ensure that when new technology is adopted, appropriate measures are taken in preparation for, and during, the adoption of such technology to assess and if necessary mitigate any money laundering or terrorist financing risks the new technology may cause. • In line with the JMLSG Guidance (and, although the Treasury does not refer to these, the Risk Factor Guidelines published by the joint European Supervisory Authorities), the government proposes to amend Regulation 19(4)(c) MLRs to explicitly include reference to undertaking risk assessments prior to the launch or use of new products, business practices and delivery mechanisms.

ANNEX 7

GROUP POLICIES

MLD 5 CHANGES (TO MLD 4)	HMT COMMENTARY ON PROPOSED AMENDMENTS TO MLRs
1. CUSTOMER, ACCOUNT AND TRANSACTION INFORMATION	
• N/A	• This is not an MLD 5 transposition requirement • Regulation 20(1)(b) MLRs (in line with MLD 4) requires relevant persons to establish and maintain policies, controls and procedures throughout the group for data protection and sharing information for the purposes of preventing money laundering and terrorist financing with other members of the group. • In line with FATF Recommendation 18.2(b), the government proposes to amend Regulation 20(1)(b) MLRs to specifically require firms to have policies relating to the provision of customer, account and transaction information from branches and subsidiaries of financial groups.