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Thematic Review on the reporting of beneficial ownership of trusts in the Trusts Ultimate Beneficial Ownership Register (“TUBOR”)

Introduction

The Trusts and Trustees Act (Register of Beneficial Ownership) Regulations (the “Regulations”), published on the 20th December 2017 by virtue of Legal Notice 373 of 2017, transposed into Maltese law the provisions of Article 31 of Directive (EU) 2015/849 of the European Parliament and of the Council of the 20th May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, more commonly known as the 4th AMLD. These provisions relate to the beneficial ownership information, including *inter alia*, the setting up of a central register of beneficial owners, in so far as these provisions are applicable to trusts and trustees. As a result of the coming into force of these Regulations on the 1st January 2018, any licensed trustee who is appointed trustee for a trust which generates tax consequences in Malta, is required to submit a declaration of beneficial ownership for every such trust to the Malta Financial Services Authority (the “MFSA” or “Authority”). The declaration includes the details indicated in the Regulations, including those related to the trustee, settlor, protector, beneficiaries or class of beneficiaries as well as any other person exercising control over the said trust.

The MFSA has published [Frequently Asked Questions](#) (“FAQs”) in order to assist trustees in submitting the required declarations of beneficial ownership.

The MFSA has developed an online platform for the Trusts Ultimate Beneficial Ownership Register (“TUBOR”), in order to facilitate the electronic submission of beneficial ownership information of trusts. Declarations of beneficial ownership of a trust which are submitted through TUBOR by a trustee require the approval of MFSA prior to such declaration being available and accessible on the register to the relevant parties. A number of checks are carried out by the MFSA in this respect including but not limited to, ensuring that the relevant information provided to the Authority is in line with the requirements set out in the Regulations as well as the Frequently Asked Questions issued by the Authority, the accuracy of the data submitted, inconsistencies in the data submitted and verification of identification details to the extent possible. The Authority also engages with trustees to obtain clarifications where necessary.

Conduct Supervision carried out on-site inspections to a number of trustees who had reported trusts under their administration which had triggered reporting obligations as a result of the fact that they had generated a tax consequence. The aim of these on-site inspections was mainly two-fold: (1) to evaluate the assessment undertaken by trustees to determine whether a trust triggers reporting obligations under the Regulations; and (2) to verify the accuracy of the beneficial ownership

information submitted on TUBOR. The findings resulting therefrom have served as the basis for a Thematic Review on the reporting of beneficial ownership of trusts in the central register, which is the subject of this Circular.

The purpose of this Circular is therefore to inform the industry of the common key findings emanating from this thematic review. This thematic review is also aimed at guiding and encouraging trustees to take the necessary corrective action in order to ensure that the information submitted by means of the declarations of beneficial ownership and held in the register is correct and reflects accurate and up-to-date information. In this respect, every trustee is expected to carefully consider the key findings set out below and to carry out a gap analysis vis-à-vis these findings, making sure that any remedial action is taken in a timely manner, including by amending any incorrect data which has been submitted on TUBOR where necessary.

Most of the findings outlined below should also serve as guidelines for those trustees who were not required to report any beneficial ownership information of trusts thus far, due to such reporting requirements not having been triggered in terms of law, but who will be required to report the beneficial ownership information of trust from January 2020 onwards. This is in view of the fact that as a result of the transposition of the provisions of Article 31 of the 5th AMLD¹, the beneficial ownership information of all trusts will become reportable from January 2020. The industry will be updated with further details about these changes as soon as the relevant amendments to national legislation in this regard are published.

Findings

1.0 Assessment to determine whether a trust generates tax consequences and thus reportable under the Trusts and Trustees Act (Register of Beneficial Owners) Regulations 2017

In terms of the Regulations, trustees are obliged to submit information on beneficial ownership if the trust generates tax consequences. Every trustee is expected to make this determination by carrying out an assessment in order to conclude whether such trust generates a tax consequence as further defined in the FAQs, and is thus reportable under the Regulations. The findings indicate that in the vast majority of cases no documentation was held on file with respect to any assessment carried out by the trustee in this respect. In the cases where an assessment had been carried out, the documentation in this regard did not include much detail and generally included a generic statement to the effect that 'An assessment was carried out and the trust does not generate any tax consequences and thus is not reportable'. From the findings it was noted that with respect to trusts whereby the trustee was appointed in such capacity as from 1 January 2018 onwards, the assessment was not being carried out at the time the trustee was appointed. From these findings it would appear that either an assessment was not carried out or where it was, this was not documented. This assessment should also have been carried by trustees for those trusts whereby they had been appointed in such capacity prior to the coming into force of the relevant Regulations,

¹ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 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 Directives 2009/138/EC and 2013/36/EU

in order to determine whether the beneficial ownership information of such trusts was reportable or otherwise within the timeframe provided by law.

The Authority expects the trustee to carry out a proper assessment as to whether the trust generates tax consequences or otherwise. This assessment is to be carried out at the time the trustee is appointed with respect to new appointments. Moreover, for all other 'unreported' trusts, a trustee should have systems and procedures in place to be able to detect any events or circumstances which would give rise to a tax consequence, and thus triggering the reporting obligations. If the trustee is not in a position to make this assessment itself due to lack of expertise, the trustee is expected to engage the services of another person who is capable of making such a determination. The Authority expects every trustee to retain a record of such assessment carried out for each trust under its administration and to ensure that such record is accessible and can be provided to the Authority upon a request to view such record.

2.0 Written Procedures

From the findings identified during onsite inspections it results that a number of trustees do not have any written procedures in place to ensure compliance with the requirements under the Regulations. In other cases procedures were in place for certain aspects but not for others, such as lack of procedures in respect of amendments to be made to declarations on TUBOR and the procedure to adopt in cases where there is a transfer of a trust to another trustee.

The Authority expects trustees to have in place comprehensive written procedures to ensure compliance with the requirements of the Regulations.

3.0 Declarations of beneficial ownership and changes thereto to be submitted in a timely manner in terms of the Regulations

The Authority has noted, both from on-site inspections carried out as well as from the checks which are carried out by the Authority when a declaration of beneficial ownership is submitted on TUBOR, that declarations have not always been submitted in a timely manner and in terms of the Regulations. The same applies to the notification of changes to reported beneficial ownership information of a trust. In terms of Regulation 3 a trustee authorised or registered in terms of article 43 or 43B of the Trusts and Trustees Act (the "Act") is required to submit to the Authority a declaration of beneficial ownership within fourteen days of being appointed as a trustee of an express trust. In terms of Regulation 5(1) where there is a change in the beneficial ownership of an express trust which generates tax consequences, the trustee is obliged to notify the Authority of this change within fourteen days after the date on which the change is recorded by the trustee. This also includes the termination of a trust which the Authority noted was not always notified to the Authority in a timely manner.

The Authority expects that declarations of beneficial ownership and any changes thereto be submitted within the stipulated time frames in the Regulation. Trustees are being reminded that the information submitted through TUBOR is of a highly sensitive nature and trustees are obliged under

the Regulations to ensure that the data submitted remains accurate and up to date. Trustees are also being reminded of the administrative sanctions which may be imposed on and incurred by the trustee in terms of Regulation 9 of the Regulations for failure to comply with their obligations in terms of the relevant provisions of the legislation.

4.0 Beneficial ownership information is to be accurate, current and up-to-date

4.1 Discrepancies and errors relating to reported beneficial ownership information

The Authority is concerned to note that a number of errors were encountered in relation to the beneficial ownership information submitted on TUBOR. This resulted clearly from checks carried out during the on-site inspections and was also encountered at times during the checks carried out by the Authority prior to the approval of declarations of beneficial ownership on TUBOR. The Authority noted, amongst others, errors and spelling mistakes in relation to names, the country of residence, identification numbers, nationality, date of birth details, missing details in relation to certain parties such as details of one settlor when the declaration of trust / trust instrument found on file clearly identified two or more settlors, and failures to include the class of beneficiaries.

The Authority expects trustees to exercise prudence, diligence and attention when inputting data in relation to the declaration of beneficial ownership submitted to the Authority. Trustees are reminded of the highly sensitive nature of the information provided and their obligations under the Regulations to ensure that such information is accurate, as well as the ramifications for trustees under Regulation 9 of the Regulations where such information is not in line with the requirements in terms of the relevant legislation.

4.2 Validity of information

The findings indicate that there were a number of instances where due diligence documents on file had expired. The trustee is to ensure that the documentation which is cited when submitting the requested data on the register is current and up-to-date. The lack of current / updated documentation could mean that data inputted in the Register is not accurate.

Trustees are expected to hold unexpired documentation on file. The information submitted in the declaration of beneficial ownership is to emanate from valid documentation. It is also important that this is ensured when changes to the beneficial ownership information are recorded and submitted to the Authority, which should be done within the timeframes set out in terms of the Regulations.

4.3 Office of the protector

The Authority notes that there were instances where the beneficial owners of a trust, as defined in the Regulations, included a protector however this was not reported on TUBOR.

Trustees are to ensure that when a protector is in office, details of the protector are included in the declaration of beneficial ownership. Where the protector is named in the declaration of trust / trust instrument but has not as yet taken up office the trustee need not submit such data until the time such person takes up office. Proper documentation in this regard should be retained by trustees.

4.4 Discrepancies in beneficial ownership

From the findings it resulted that there were instances where beneficiaries were included in the original trust deed but were not declared as beneficiaries in the declaration submitted on TUBOR. It was also noted that at times the settlor was only being declared as settlor even though he was also a beneficiary.

Authorised persons are expected to ensure that information on all beneficiaries is submitted as per the original declaration of trust / trust instrument unless such beneficiaries have been formally excluded, for instance through a deed of exclusion in relation to such beneficiaries.

4.5 Renunciation of a beneficial owner's benefit

The Authority notes that in certain cases the trustee held on file documentation which revealed that particular beneficiaries had renounced to their benefit altogether however the declaration of beneficial ownership submitted on TUBOR appeared to include these same individuals.

The Authority expects trustees to be diligent when reporting beneficial ownership information of trusts under their administration and to ensure that when such renunciations are made these are reflected and qualified clearly in the data provided to the Authority, keeping in mind that such data is accessible to third parties in various degrees and to the extent permissible by law.

5.0 Verification of beneficial ownership information submitted on TUBOR

The Authority was not able to confirm and verify all information submitted on TUBOR as there were cases where there was no supporting documentation on file. This included identification details related to country of residence, nationality, date of birth as well as the death of a beneficial owner.

The Authority expects trustees to retain on file supporting documentation in order for the Authority to be able to verify the reported information. When supporting documentation may not be available, for example because verification of identity of the beneficial owner has not been triggered in terms of the AML/CFT regulatory framework, trustees are expected to at least keep a record on file to show that certain facts are personally known to the trustee. Similarly, with respect to the residence of a minor, for whom a document confirming residence is not available, this can be ascertained personally by the trustee if he is personally aware of his residence in view of the fact that he has visited the particular residence. Where the trustee reports that one of the beneficial owners is deceased, the trustee should hold documentation, such as a death certificate, on file. Without such documentation the Authority is not able to ascertain the date of death of the beneficial owner.

6.0 Class of beneficiaries - named beneficiaries

The findings indicate that in certain cases trustees included certain beneficiaries as a class rather than individuals despite the fact that the beneficiaries were named in the declaration of trust / trust instrument.

Trustees are being reminded to consult the FAQs (particularly Q. 5(d)(ii)) in this regard, which provides that when a beneficiary can be clearly identified by his or her name, then the identity details required under the Regulations need to be provided. If an individual from the class of beneficiaries can be identified, then the beneficial ownership details are to be provided. The same applies to individual beneficiaries within a class of beneficiaries who are named and can be identified, even if such individuals have not received any financial payment or been provided with a non-financial benefit by the trustee, to the extent that such details are available.

Trustees are required to list beneficiaries as individuals rather than forming part of a class when the identity of such individuals is clearly identified and determined.

7.0 Discrepancies between the declaration of trust / trust instrument and the declaration of beneficial ownership

The findings indicated that in certain cases there were discrepancies between the wording of certain relevant clauses in the trust instrument and what was reported by the trustee. This was particularly the case with respect to details regarding the nature and extent of the benefit, class of beneficiaries and suspensive conditions. It was noted that in certain instances trustees tried to reword such clauses and when doing so ultimately did not accurately indicate what the trust instrument intended to convey. In other cases a suspensive condition in the trust instrument was not included.

Whilst it is not required that trustees quote *verbatim* from certain relevant clauses of the trust instrument the Authority expects trustees to ensure the wording used in the information submitted on TUBOR clearly reflects terms of the trust instrument.

8.0 Persons exercising ultimate and effective control over a trust

From the findings it was observed that, as evidenced from the documentation held on file, in a number of instances certain individuals who were exercising and effectively controlling the administration of the trust as set out in the Regulations, were not being reported.

The Authority is concerned to note that in certain cases it was very clear that certain individuals were exercising control in one or more ways as defined in the Regulations, however the trustee did not indicate this when reporting the beneficial ownership of the trust. The Authority expects that when an individual is clearly exercising ultimate and effective control over the trust, and such individual is not indicated elsewhere as a beneficial owner, the details for such individual are duly reported by the trustee.

9.0 Letter of wishes

The Authority is concerned to note that very often the settlor's letter of wishes is not always being taken into consideration by the trustee when establishing the beneficial owners of a trust. Whilst we understand that a letter of wishes is not binding on a trustee with respect to the exercise of such trustee's powers and discretions, the trustee should take the letter of wishes into consideration to ensure that the information on beneficial ownership submitted to the Authority reflects the settlor's intentions. It is after all a well-established common practice that trustees give a certain weight to the wishes of the settlor, as expressed in a letter of wishes, in the administration of a trust.

Conclusion

We take this opportunity to remind trustees of the highly sensitive nature of the data being submitted on TUBOR and the obligation of the trustee to ensure that the information held in the central register of beneficial ownership of trusts is accurate and up to date. Such registers are fundamental to demonstrate Malta's active commitment as a jurisdiction to fulfil its obligations as a Member State to enhance transparency and strengthen the fight against money laundering and terrorist financing across the European Union. In this regard, and in the interest of Malta's reputation as a sound financial jurisdiction, all stakeholders are expected to carry their weight in so far as their role with respect to the Trusts Beneficial Ownership Register. We trust that the contents of this circular will help trustees to identify any shortcomings and take the appropriate remedial action, whilst also paving the way for trustees who will be reporting beneficial ownership information of trusts following the coming into force of the relevant legislation transposing the requirements of the 5th AML Directive.

We are available to assist in any queries you may have in order to ensure that you are complying with the Regulations. Queries regarding the content of this circular are to be directed to the undersigned or Dr Petra Camilleri (PCamilleri@mfsa.com.mt) or Dr Amanda Poole (APoole@mfsa.com.mt) or Dr Charlene Chircop (CChircop@mfsa.com.mt).

Dr Michelle Mizzi Buontempo
Malta Financial Services Authority

Head

MMizziBuontempo@mfsa.com.mt