

ALLEN & OVERY

5MLD – Fiduciary arrangements and trusts: new obligations

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After the creation of a register of beneficial owners in January 2019, Luxembourg has now established a register of *fiducies* and trusts and finalised the transposition of the 5th anti-money laundering directive (5MLD).

The 5th anti-money laundering directive (**5MLD**¹), which amends Directive (EU) 2015/849 (**4MLD**), has been implemented into Luxembourg law by various pieces of legislation. The last piece of the puzzle is the act of 10 July 2020 implementing Article 31 4MLD, as amended by 5MLD, in relation to the register of *fiducies* and trusts (the **RFT Act**).

The RFT Act, which is separate from the amended act of 12 November 2004 on the combat against money laundering and terrorist financing (the **AML Act**) and the amended act of 13 January 2019 pertaining to the register of beneficial owners², deals with two different topics:

- the information on beneficial owners to be obtained and retained by trustees/fiduciaries – Chapter 2 of the RFT Act; and
- the creation of a register of *fiducies* and trusts – Chapters 3 to 5 of the RFT Act.

It is worth noting that the scope of the rules set out in Chapter 2 and Chapters 3 to 5, respectively, do not cover the same scenarios and therefore particular attention should be paid to the scope of the rules.

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

² Which applies to all entities registered with the Luxembourg Trade and Companies Register pursuant to Article 1, points 2 to 16 of the law of 19 December 2002 on the trade and companies register and the accounting and annual accounts of undertakings, as amended. See [our previous eAlert on this topic](#).

1. Information on beneficial owners to be obtained and retained by trustees/fiduciary agents and other obligations

The RFT Act has repealed the law of 10 August 2018 that provided for obligations on fiduciary agents of Luxembourg *fiducies* set up in accordance with the amended act of 27 July 2003 on the trust and fiduciary contracts.

The RFT Act not only overhauls the rules applicable since 2018 but also expands their scope in that the new rules apply to express trusts managed in Luxembourg. The RFT Act does not include any further guidance on the concept of “*trust managed in Luxembourg*”. It would seem that a trust will be considered as managed in Luxembourg if at least one of its trustees is resident or established in Luxembourg.

The new rules also apply to legal constructs that have a structure or functions similar to those of a *fiducie* or a trust (according to the criteria set out in the RFT Act). For the purpose of the RFT Act, those legal arrangements are assimilated to *fiducies* and trusts.

In respect of *fiducies* and express trusts managed in Luxembourg (and by extension similar legal constructs), the relevant fiduciary agent(s) or trustee(s) must:

- a) **obtain and hold accurate and up-to-date information on their beneficial owners.** This information includes the identity of: (i) the settlor(s); (ii) the trustee(s)/fiduciary agent(s); (iii) the protector(s) (if any); (iv) the beneficiaries or class of beneficiaries; and (v) any other natural person exercising effective control of the trust/*fiducie*. The information must be kept at the place of administration of the *fiducie* or trust.
- b) **obtain and keep accurate and up-to-date “basic” information** as further detailed in the RFT Act on: (i) other professionals subject to the AML Law (the **Professionals**); and (ii) entities governed by foreign law, which, if their head office were located in Luxembourg, would be considered as Professionals who provide services to the *fiducie* or trusts or who enter into a business relationship with them.
- c) **retain the above information for five years** after they ceased to be involved in the fiduciary or trust arrangement;
- d) **provide the national authorities** (among others the State prosecutor, the investigating judges, the financial intelligence unit (FIU), the CSSF, the CAA as well as the tax authorities) **and self-regulatory bodies**, upon request, with the information referred to above and information on the proper registration of the *fiducie* or trust in a register in accordance with Article 31 4MLD; and
- e) **inform Professionals of their status** and provide them with the information on beneficial ownership (see paragraph a) above) and information on the proper registration of the *fiducie* or trust in a register in accordance with Article 31 4MLD when they enter into a business relationship with them or enter into an occasional transaction whose amount exceeds certain

thresholds. Upon appropriate request by such Professionals for the purpose of carrying out their due diligence obligation, they must further provide information on the assets of the *fiducie* or trust held or managed in the context of the business relationship or occasional transaction.

The RFT Act also provides for cooperation obligations incumbent upon the beneficial owners and the other professionals above who provide services to the *fiducie* or trust or have entered into a business relationship or carry out an occasional transaction for the *fiducie* or trust.

2. Registration obligation

The RFT Act creates a new register of *fiducies* and trusts (the **Register**). The Register is administered by the *Administration de l'Enregistrement, des Domaines et de la TVA* (**AED**).

Registration in the Register is mandatory for:

- any *fiducie* (governed by the amended act of 27 July 2003 on the trust and fiduciary contracts) or express trust (and by extension similar legal constructs) that has at least one fiduciary agent or trustee established or resident in the Grand Duchy of Luxembourg; and
- any other *fiducie* or express trust (and by extension similar legal construct) whose fiduciary agents or trustees are not established in the Grand Duchy of Luxembourg or in another EU Member State but enters into a business relationship with a Professional in the Grand Duchy of Luxembourg or acquires real estate in the Grand Duchy of Luxembourg.

2.1 Registration process

The following information must be provided to the AED, by electronic means, for the purpose of the registration:

- a) the name of the *fiducie* or trust;
- b) date of enactment;
- c) whether the *fiducie* or trust holds or has a controlling interest in a company or other legal entity (other than an entity that is registered in a register of beneficial owners within the meaning of Article 30 4MLD) through direct or indirect ownership, in particular by means of bearer shares or through control by other means; and
- d) information related to each of the beneficial owners of the *fiducie* or trust:
 - in the case of natural persons: name(s) and surname; nationality; full date and place of birth; country of residence; precise private or professional address; national identification number (for persons registered in the Luxembourg National Register of Natural Persons) or foreign identification number; and the nature of the involvement of the beneficial owner in the *fiducie* or trust and the extent of the actual interests held;

- in the case of a legal person registered in a register of beneficial owners within the meaning of Article 30 4MLD: legal name of the legal person and, where applicable, the abbreviation and the commercial name used; precise address of the registered office; the identification/registration number with the Luxembourg Trade and Companies Register, or, if for legal persons not registered with the Luxembourg Trade and Companies Register, the name of the relevant foreign register and the identification number in this register (if applicable); and the nature of the involvement of the beneficial owner in the *fiducie* or trust and the extent of the actual interests held.

However, as regards the beneficiaries of a trust or *fiducie*, the RFT Act further clarifies that, where the beneficiaries are designated by characteristics or by category, the registration must specify that these persons are designated (in the fiduciary contract or in the constituting documents of the trust) by characteristics or by category and provide a description of these characteristics or of this category.

In specific cases where there are several fiduciaries or trustees established or residing in different EU Member States, the registration obligation is deemed complied with if the Obligated Person, established or residing in the Grand Duchy of Luxembourg, provides the AED with a certificate evidencing registration in an equivalent register or an extract of the information on beneficial owners kept in such an equivalent register.

Any registration request that is incomplete or does not comply with applicable statutory provisions will be **refused**. In this case, the applicant should rectify its request (by completing, modifying or withdrawing the relevant information or by introducing supporting documents) within **15 days** from the date of the refusal decision by the AED.

A unique registration number is assigned to each *fiducie* or trust registered with the Register.

Any change in the above information or any termination of the *fiducie* or trust must be registered with the Register in the month following the event which triggers the modification. The same applies if the reasons for the registration of the above information have ceased to exist.

The registration and modifications are carried out electronically in accordance with procedures that will be further set out in a grand ducal regulation.

The Register retains the information described above **for five years** after the termination of the *fiducie* or trust or after the reasons for the registration of the above information have ceased to exist. The information on the beneficial owners is retained for five years after the termination of that person's involvement in the *fiducie* or trust.

The AED has the power to take administrative measures against or impose administrative sanctions on Obligated Persons (including members of their management or other persons responsible for a breach of applicable obligations) if they fail to register the required information or if they voluntarily provide inaccurate or obsolete information to the AED.

2.2 Access rules

The RFT Act provides for different types of access rights:

- a) Full access: The national authorities (for exercising their duties, such as the public prosecutor, the CSSF, the CAA, tax administrations, etc.), the self-regulatory bodies (for exercising their supervisory role in the context of the AML/CTF) as well as the Professionals (in the context of carrying out customer due diligence measures) will have access to all the information kept in the Register;
- b) Limited access: Any (natural or legal) person demonstrating a legitimate interest in preventing the use of the financial system for money laundering or the financing of terrorism can also request access to limited information in the Register (as listed in the RFT Act) in relation to a particular *fiducie* or trust, on the basis of a duly motivated request for access addressed to the AED together with the necessary supporting documentation. A specific procedure is foreseen in that respect. The information is available subject to the payment of an administrative fee (to be defined by a grand ducal regulation); and
- c) Limited access: certain information (as listed in the RFT Act) is accessible to any natural or legal person that files a written request in relation to a *fiducie* or trust which holds or owns a controlling interest in any corporate or other legal entity (other than those referred to in Article 30 4MLD), through direct or indirect ownership, including through bearer shareholdings, or through control via other means. The information is available subject to the payment of an administrative fee (to be defined by a grand ducal regulation).

The access procedures will be further specified by a grand ducal regulation.

A beneficial owner or its proxy may nonetheless request, on a case-by-case basis and in exceptional circumstances (and subject to strict conditions set out in the RFT Act), on the basis of a duly motivated request addressed to the AED, that access to all or part of the information registered with the Register is limited only to national authorities, self-regulatory bodies, credit institutions and financial institutions, as well as bailiffs and notaries acting in their capacity as public officials, when access by other persons to this information would expose the beneficial owner to a disproportionate risk, a risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation or where the beneficial owner is a minor or otherwise legally incapable.

A fine of EUR1,250 to EUR1,250,000 may be imposed upon any natural or legal persons who have used the information to which they had access for purposes other than those for which this access had been granted in accordance with the provisions of the RFT Act.

The RFT Act further provides that anyone with access to the information registered with the Register must immediately notify the AED of any discrepancy they notice between the information on beneficial owners available in the Register and the information on the beneficial owners they have. When such a notification occurs, the AED must use its supervisory powers so that the information entered in the Register is updated (until the update of the information, a specific note will be inserted).

3. Entry into force

The RFT Act does not provide for a transitional period. Therefore, the rules set out therein apply as of 17 July 2020.

If you would like to discuss any of the issues raised in this publication, please speak to your usual Allen & Overy contact or one of the contacts listed below.

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