

New Version of the Bill Establishing a Register of Fiduciary Contracts and Trusts



Mrs. Isabelle Charlier
Partner



Mr. Vincent Renaud
Junior Associate

isabelle.charlier@wildgen.lu vincent.renaud@wildgen.lu

Whilst the newly created Register of beneficial owners of companies and other legal entities has recently been implemented in Luxembourg by the law dated 13 January 2019, the bill establishing a Register of fiduciary contracts and trusts (the 'Register') is still following its legislative path, which represents a priority because of the visit of the Financial Action Task Force ('FATF ') assessors scheduled in the year 2020.

On 23 October 2019, the government's amendments to the bill N°7216 B (the 'Amended Bill') establishing the Register were issued. The main purpose of the Amended Bill is to implement Article 31 of (EU) directive 2015/849, as modified by the fifth anti-money laundering (EU) directive 2018/843.

The Amended Bill not only establishes the Register but also creates new obligations for fiduciary contracts and trusts, as far as providing information to the control authorities or self-regulatory organisations is concerned. Such provisions are meant to replace those of the law of 10 August 2018 on the information to be obtained and kept by fiduciaries.

Scope of Application of the Register

The Amended Bill widens the scope of trusts, which need to file information with the Register. It not only refers to the definitions of the Hague Convention of 1 July 1985 but also introduces a definition of the so-called trust *exprès*, being a trust clearly established by the constituent by way of a deed (in opposition to trusts resulting from the law, such as constructive trusts).

The definitions of trust, trustee and trust *exprès* are in line with FATF recommendations.

A fiduciary contract as defined by the Amended Bill means a fiduciary contract where the fiduciary is a credit institution, an investment firm, an investment company with variable or fixed

share capital, a securitisation company, a fiduciary representative acting in the context of a securitisation, as governed by the law dated 27 July 2003 relating to the trust and fiduciary contracts as amended.

The Amended Bill also identifies as fiduciary contracts and trusts legal constructions having a similar structure and function as those of a fiduciary contract or a trust. In its opinion issued on 4 November 2019, the Luxembourg Bankers' Association ('ABBL') stated thereon that such an expansion of the scope of trusts lacked clarity. Indeed, the ABBL points out the lack of precision of such legal constructions identified as trusts and the risk of life insurance contracts falling within this definition of legal constructions. The ABBL recalls that life insurance contracts are already regulated, and stands for a clear exclusion of such contracts from the scope of the Amended Bill.

Article 13 of the Amended Bill provides that all fiduciary contracts and trust *express* having a trustee or fiduciary established or residing in Luxembourg should be registered with the Register monitored by the registration tax and VAT administration (Administration de l'Enregistrement et des Domaines) (the 'AED'). The AED will provide a registration number to each registered fiduciary contract and trust.

When the fiduciaries of a fiduciary contract or the trustees of a trust *express* are established or residing in several member states of the EU, it will be sufficient to provide the AED with a certificate proving the registration with a foreign similar register.

Obligations of Trustees and Fiduciaries

Obligations Regarding the Register (Chapter 4 of the Amended Bill)

The trust *express* and the fiduciary contracts, as defined by the Amended Bill, will have to provide the following information, for the sake of their registration:

- registration number
- name of the fiduciary contract or the trust, if applicable
- date of establishment of the fiduciary contract or the trust
- statement on whether the fiduciary contract or the trust holds, directly or indirectly, participation allowing control of an entity
- for each beneficial owner:
 - in the case of a natural person:
 - first name and last name
 - citizenship
 - date and place of birth
 - country of residence
 - private or professional address
 - identification number (or foreign identification number)
 - nature of involvement in the fiduciary contract or the trust and scope of interests held

- in the fiduciary contract or the trust
- in the case of a legal person:
 - corporate name
 - registered office
 - registration number (and name of the register, if it is registered with a foreign register)
 - nature of involvement in the fiduciary contract or the trust and scope of interests held in the fiduciary contract or the trust

According to Article 19 of the Amended Bill, everyone having access to the information in the Register and noticing a discrepancy with the information it has should inform the AED of such a discrepancy.

The information in the Register may be transmitted to any person proving a legitimate interest in the frame of the fight against money laundering. The decision to grant access to such information will be taken by the director of the AED and may be appealed by the entity, of which the information oughts to be disclosed, within a one-month period (Article 27 of the Amended Bill).

Obligations Regarding the Information to be Kept by the Fiduciary Contract and the Trust

Article 2 of the Amended Bill provides that trustees and fiduciaries should obtain and keep information regarding the fiduciary contract or the trust at the place of administration of such a fiduciary contract or a trust. This information relates to the identity of the following:

- the constituent party(ies)
- the trustee(s) or fiduciary(ies)
- the protector(s) (if applicable)
- the beneficiary(ies) or the category of the beneficiary(ies)
- all other natural persons having effective control of the fiduciary contract or the trust

This information should be exact and up-to-date and be updated within a reasonable period of time if any change occurs.

The new Article 3 of the Amended Bill provides that the trustees of trust *express* managed in Luxembourg and fiduciaries are obliged to obtain and keep elementary information regarding the other regulated agents and service providers of the trust or the fiduciary contract. This includes investment advisors, investment managers, accountants and tax advisors. This information should also be exact and up-to-date and be updated within a reasonable period of time if any change occurs.

The information mentioned in Articles 2 and 3 ought to be kept for a duration of five years after the end of the involvement of the concerned party with the trust or the fiduciary (without prejudice, however, of longer legal periods that may be applicable).

The new Article 5 of the Amended Bill states that control authorities should have access upon request to the information listed above.

The information mentioned in Article 2 of the Amended Bill should be transmitted to the relevant professionals (as defined by Article 2 of the law of 12 November 2004 on anti-money laundering).

Sanctions

The new Bill divides the monitoring of the respect of its dispositions so that for (i) the respect of obligations regarding the Register, the AED is responsible and for (ii) the respect of obligations to obtain and maintain certain information, the Commission de Surveillance du Secteur Financier (the 'CSSF'), the Commissariat aux Assurances (the 'CAA') and self-regulatory organisations are responsible for the control of the entities under their respective monitoring; the AED will be responsible for the monitoring of the professionals and fiduciary contracts or trusts not monitored by either the CSSF, the CAA or a self-regulatory organisation.

For the sake of their mission, such control authorities may do the following:

- have access to any document and obtain a copy thereof
- request information from any person and, if necessary, summon any person subject to their monitoring
- proceed with inspections and investigations and seize any document and electronic file that may be useful in that respect
- order to stop any practice contrary to Article 9 of the Amended Bill

Fiduciary contracts and trusts that fail to file the information required with the Register or fail to obtain, keep and transmit the information listed in Articles 2 and 3 for the duration mentioned in Article 4 of the Amended Bill may be sanctioned by the relevant control authorities by means of the following:

- admonition (avertissement)
- blâme
- public declaration stating the identity of the person who violated the law and the nature of the violation
- administrative fine in a maximum amount of either (i) twice the amount of the advantage resulting from the violation or (ii) EUR 1,250,000

For their decision, the Amended Bill states that the control authorities will take into account, amongst others, the gravity and duration of the violation, the financial situation of the person responsible, the harm suffered by third parties and possible previous violations.

Such decisions may be appealed before the administrative judge within a period of one month after the notification of the decision.

Conclusion

The Amended Bill is still subject to the approval of the Luxembourg Parliament, and it should be kept in mind that further amendments are still possible at this stage. However, one can already state that the obligations of trustees and fiduciaries will be increased in comparison to the law of 10 August 2018. Trustees and fiduciaries should start assessing their future obligations, as far as the Register is concerned, in order to file correct information once the Amended Bill is enacted, especially in consideration of the amounts of the administrative fines at stake.