

# ATOZ NEWS

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## New transparency rules in Luxembourg: identification of the beneficial ownership of trusts, fiducies and of similar legal arrangements and registration in the register of fiducies and trusts

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### Background

The requirements to increase the transparency of trusts and similar legal arrangements have only been partly implemented in Luxembourg to date. The Law of 10 August 2018<sup>1</sup> enacted only a limited number of the provisions of the Article 31 of the 4<sup>th</sup> AML Directive<sup>2</sup> into Luxembourg law. The Luxembourg *fiduciaries* are currently obliged to gather information in order to identify the beneficial owners of the *fiducies* for which they act as *fiduciaires*. Article 31 of the 4<sup>th</sup> AML Directive has, in the meanwhile, been substantively amended at EU level by the provisions of article 1 (16) of the 5<sup>th</sup> AML Directive<sup>3</sup>. Bill n° 7216B<sup>4</sup> will fully transpose the EU provisions into domestic law, while also taking into account Recommendation 25 of the Financial Action Task Force guidance on transparency and beneficial ownership of legal arrangements<sup>5</sup> and its interpretation note. Bill n° 7216B is part of Luxembourg's effort to fully implement the 4<sup>th</sup> and the 5<sup>th</sup> AML Directives and it is intended to be read in conjunction with the amended Law of 12 November 2004 on the fight against money laundering and terrorist financing (the **AML Law of 2004**).

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<sup>1</sup> Law of 10 August 2018 on information to be obtained and held by trustees and transposing Article 31 of 4th AML Directive (the **Law of 10 August 2018**).

<sup>2</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (the **4<sup>th</sup> AML Directive**).

<sup>3</sup> 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 (the **5<sup>th</sup> AML Directive**).

<sup>4</sup> 7216B – Bill 1) transposing: (a) Article 31 of the 4<sup>th</sup> AML Directive; and (b) Article 1 (16) of the 5<sup>th</sup> AML Directive; 2) amending the amended law of 27 July 2003 on trust and fiduciary contracts; and 3) repealing the law of 10 August 2018 on the information to be obtained and retained by the trustees and transposing Article 31 of the 4<sup>th</sup> AML Directive (**Bill n° 7216B**).

<sup>5</sup> The International standards on the fight against money laundering and the financing of terrorism and proliferation of weapons of mass destruction - The FATF Recommendations - the latest version of which, updated in June 2019, is available [here](#).

## The new rules

The new rules aim to increase transparency of the beneficial ownership of trusts, *fiducies* and similar legal arrangements (**SLAs**). Bill n° 7216B brings trusts and trustees (within the meaning of the The Hague Convention of 1 July 1985 on the law applicable to the trust and its recognition) and other types of legal arrangements having a similar structure or functions to a trust as well as the persons occupying an equivalent position in the legal arrangement to that of a trustee into the scope of the law. EU Member States need to determine which legal arrangements will be within the scope, depending on their own national rules. In Luxembourg, the *fiducie* and the *fiduciaire* qualify as legal arrangements similar to a trust and its trustee<sup>6</sup>.

According to Bill n° 7216B, the trustees' two main obligations are:

- (i) to obtain, update and hold adequate, accurate, and current beneficial ownership information relating to a trust, and
- (ii) to enter beneficial ownership information into the register of *fiducies* and trusts, to be created by Bill n° 7216B.

Bill n° 7216B also sets out the rules concerning access to the register of *fiducies* and trusts.

### 1. Gathering and disclosing information on beneficial ownership, assets and service providers of trusts

Trustees and fiduciaries will need to obtain and keep information about the beneficial owners of any express trust administered in Luxembourg for which they are trustee and any *fiducie* for which they are fiduciary at the place of administration of the express trust or *fiducie*. This information includes, but is not limited to, the identity of (1) the constituent(s); (2) the trustees or fiduciaires; (3) the protector(s), if any; (4) beneficiaries or classes of beneficiaries; and (5) any other natural person exercising effective control over the trust. The trust deed or other documents setting out control rights over the trust or its assets should also be obtained and kept. The trustee needs to share this information, on demand, with the control authorities and self-regulating bodies. It should also voluntarily share it with the Luxembourg-based professionals with whom it enters into a business relationship or performs an occasional transaction whose amount exceeds certain thresholds. If requested by the professionals, acting solely for the purpose of fulfilling their customer due diligence obligations deriving from the AML Law of 2004, the trustee needs to provide information on trust assets held or managed as part of the business relationship.

The trustee, in relation to any trust for which it acts as a trustee and professionals, in relation to any trust, need to provide, upon request, to the prosecutors, judges, the Financial Intelligence Unit (**FIU**) and control authorities, any and all the information they have on the trust(s).

In addition to the above, trustees of express trusts administered in Luxembourg and the fiduciaries will need to gather and keep basic information about other regulated agents and service providers of the trust, including investment advisers, investment managers, accountants and tax advisers. Trustees may be asked to share this information with control authorities and self-regulating bodies.

Trustees are required to retain the information referred to above for a period of five years following the termination of their involvement in the trust.

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<sup>6</sup> For the purposes of this ATOZ news, the terms *fiducie* and *fiduciaire*, as well as the terms similar legal arrangements and the persons occupying an equivalent position in a legal arrangement are encompassed in the generic terms trust and trustee unless otherwise stated.

The Commission de Surveillance du Secteur Financier (**CSSF**), the Commissariat aux Assurances (**CAA**), self-regulating bodies and the Administration de l'Enregistrement, des Domaines et de la TVA (**AED**)<sup>7</sup> will monitor the compliance of the Luxembourg-resident trustees as regards their obligation to gather and provide the beneficial ownership information on trusts. The AED can also oblige beneficial owners and professionals to disclose the information needed by the trustees to fulfil their identification obligations, under threat of penalties of up to EUR 25,000.

The failure to gather, update or provide the beneficial ownership identification information with respect to trusts or their assets may trigger administrative sanctions. Trustees or other professionals may be hit with administrative fines of up to EUR 1,250,000. The supervisory authorities can also name and shame trustees and other professionals by publishing their names and the nature of the breach on their websites.

## 2. Registering and retaining information in the Register of Fiducies and Trusts

Bill n° 7216B creates the register of *fiducies* and trusts (hereafter the **RFT**). The RFT will be managed and administered by the AED and all information will be submitted and recorded electronically.

The following needs to be registered or filed in the RFT:

- any *fiducie* having a *fiduciaire* which is established or resides in Luxembourg;
- any express trust having a trustee which is established or resides in Luxembourg;
- any trust the trustee of which, while being established or residing outside the EU, is acting in the name of the trust and enters into a business relationship with a professional established or residing in Luxembourg;
- any trust the trustee of which, while being established or residing outside the EU, is acting in the name of the trust and acquires real estate situated in Luxembourg;
- the certificate providing proof of registration or an extract from beneficial ownership information kept in a register held by a Member State, to be provided by the Luxembourg-based trustee or *fiduciaire* with respect to the express trust or *fiducie* having multiple trustees or fiduciaries established in different Member States. The certificate or the extract provided to the AED meets the registration requirement.
- the certificate providing proof of registration kept in a register held by another Member State or an extract from the beneficial ownership information held in such a register, where the *fiduciaire* of that *fiducie* or the trustee of that express trust engages in multiple relationships in different Member States in the name of the *fiducie* or express trust. The certificate or the extract provided to the AED meets the registration requirement.

Each *fiducie* and express trust registered in the RFT will be assigned a unique registration number. The information held in the RFT must be adequate, accurate and up-to-date.

The information to be registered with respect to the *fiducie* or trust in the RFT shall specify:

1. the registration number;
2. the name of the express trust or *fiducie*, if any;
3. the date of conclusion of the *fiducie* or express trust;
4. (i) detailed information for each beneficial owner of the *fiducie* or trust (full name, nationality, full date and place of birth, country of residence, precise address for the personal residence or professional domicile, identification number, or denomination, registered office address and legal entities' register name or registration number, and, for both individuals and legal entities, the nature of the person's involvement in the trust and the extent of his/her/its actual interests held); or (ii) a statement that the beneficiaries are designated by characteristics or by category together with a description of these characteristics or this category;

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<sup>7</sup> Administration of registration, customs and VAT.

5. if the *fiducie* or trust owns or has a controlling interest in a corporation or in another legal entity incorporated outside of the Member States, by direct or indirect ownership, in particular by means of bearer shares or through control by other means.

Trustees need to register and update the relevant information in the RFT within one month following the event triggering the registration – including when the trust is terminated or after the reasons for the inscription of information have ceased to exist. Anyone with access to information in the RFT (obliged entities or supervisory authorities) shall promptly report to the AED any discrepancy observed between the beneficial ownership information in the register and the beneficial ownership information available to them. The AED will then update the RFT to inform other persons with RFT access that the beneficial ownership information is not accurate and that corrections have been requested.

The entries into the RFT and the information registered will be kept for five years after the termination of the trust or after the reasons for the inscription of the information in the RFT have ceased to exist. The information relating to the beneficiaries will be deleted five years after they cease their involvement with the trust.

The AED will monitor the compliance with the obligation to register the relevant information in the RFT. The AED can oblige trustees to file the information needed, under threat of penalties of up to EUR 25,000. The omission to file or to update the information or the filing of inaccurate or not current information in the RFT may trigger administrative fines of up to EUR 1,250,000.

The RFT is expected to be linked to other central registers via the European Central Platform by March 2021.

### **3. Regulating the access to the information in the Register of Fiducies and Trusts**

The information entered in the RFT can be accessed as follows:

- by national authorities, in the exercise of their missions, without restrictions;
- by self-regulatory bodies, in the exercise of their supervisory role in the fight against money laundering and against the financing of terrorism;
- by professionals, in applying customer due diligence measures in accordance with the AML Law of 2004;
- by any natural or legal person who introduces a written request to access the information on a trust that holds or has a controlling interest in a company or other legal entity incorporated outside of the Member States, by direct or indirect ownership, in particular by means of bearer shares or by means of control by other means;
- by any natural or legal person who demonstrates a legitimate interest in preventing the use of the financial system for the purposes of money laundering or terrorist financing.

The request for access to the information in the RFT by any natural or legal person on the grounds of a legitimate interest must be duly motivated. Generally speaking, access is highly restricted. Each request may only concern one trust and the applicant must indicate the basis for the application and the uses for which he/she/it is requesting access to the information. The applicant must enclose detailed identification information, an extract from the criminal record of each person who will access the data and any document likely to justify the existence of a legitimate interest. The permission to access limited information on the RFT is granted on a case-by-case basis by a decision taken by the Director of the AED or his delegate. The information obtained can only be used for the purposes stated in the request and any misuse can be punished by fines of up to EUR 1,250,000. If a positive decision also affects the data of natural persons, the AED will notify them so that they can possibly challenge the decision.

The provision of information from the RFT to natural or legal persons will be subject to the payment of a fee. Its amount will be determined by Grand-Ducal Regulation and may not exceed the administrative costs of making the information available, including the costs for maintenance and development of the RFT.

A beneficial owner or its representative may request that access to all or part of the beneficial ownership information be limited. The limitation would be granted on a case-by-case basis and in exceptional circumstances, based on a duly motivated request to the AED. Access to all or part of the beneficial ownership information will continue to be available to only national authorities, self-regulatory bodies, credit institutions and financial institutions, bailiffs and notaries acting in their capacity as public officers. The limitation is granted where access by other persons to this information would expose the beneficial owner to a disproportionate risk, the risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation or where the beneficial owner is a minor or otherwise incapacitated. Access can be limited to a period of three years, renewable upon request. The AED will register a corresponding reference in the RFT and it will only publish annual statistical data on the number of exemptions granted and the reasons given.

## Entry into force

Bill n° 7216B is currently undergoing parliamentary scrutiny, and further comments from industry bodies are expected soon. The Bill is meant to transpose the 5th AML Directive and to put in place the RFT no later than 10 March 2020. There is added pressure to implement the FATF recommendations given that Luxembourg will undergo an assessment of its anti-money laundering rules by the FATF next year.

The new law will amend the modified law of 27 July 2003 relating to trusts and fiduciary contracts. It will require each separate trust estate to be recorded in the trustee's books in a clearly identified trust account. The account shall also include a reference to the trust agreement to which it relates.

The new law will also abolish the Law of 10 August 2018. Some provisions from the latter that remain unchanged will be included in the former.

## Next steps

Bill n° 7216B introduces considerably heavier transparency obligations concerning the beneficial ownership of trusts and similar legal arrangements, compared to those previously contained in the Law of 10 August 2018. The fines for misconduct are also noticeably higher.

Firstly, Luxembourg-based fiduciaries, trustees and professionals, but also beneficial owners worldwide, will need to undergo a fact-finding mission to identify the fiducies, trusts and other similar legal arrangements they are connected to, as well as their beneficial owners, service providers and assets. This should enable them, in a second phase, to provide, gather and keep updated trust files. Finally, it will enable them to register, if needed, the relevant information in the RFT. Bill n° 7216B in its current form does not provide a deadline for the registration of the beneficial ownership of existing trusts in the RFT, but this may change following comments. The RFT needs to be in place by 10 March 2020.

We can help you prepare and compile the relevant identification and support documentation to be kept, as well as handle all the filing with the RFT (registrations, access restrictions requests) and provide assistance for your interactions with the national authorities.

**Can we help? Do you have further questions?**



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