

PROVISION OF TRUST SERVICES

RELATED PROVISION: ARTICLE 5m OF COUNCIL REGULATION 833/2014 **FREQUENTLY ASKED QUESTIONS – AS OF 8 JULY 2022**

1. What should be understood by the term “trust or any similar legal arrangement” as mentioned in Article 5m of Council Regulation (EU) 833/2014?

Last update: 24 June 2022

There is a variety of trusts and legal arrangements used throughout the Member States. The common law trust serves as an example but there is no single definition of what qualifies as a “similar legal arrangement”. Accordingly, it would be relevant to assess such an arrangement’s structure or function as compared to that of a trust, such as the establishment of a fiduciary bond between parties and a separation or disconnection of legal and beneficial ownership of assets.

You may refer to 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 as well as the report from the Commission assessing whether Member States have duly identified and made subject to the obligations of Directive (EU) 2015/849 all trusts and similar legal arrangements governed under their laws.¹

2. What activities are prohibited in relation to trusts? How is this prohibition to be applied in practice?

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Article 5m, paragraph 1, prohibits the registration of any trust or similar legal arrangement. Accordingly, no EU person should register a new arrangement. Where registration is mandatory under national law in order for the trust or another similar legal arrangement to be set up, this would not be possible.

With regards to trusts or similar legal arrangements which are already established, Article 5m paragraph 1 prohibits the provision of a registered office, business or administrative address as well as the provision of management services whereas paragraph 2, prohibits the provision of trustee services to any trust or similar legal arrangement.

As such services may be necessary for the operation of such arrangements, the prohibition requires their dissolution, the resurfacing of all assets as well as the restitution of assets to the

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0560>

trustor or distribution to beneficiaries (subject to a derogation under Article 5m paragraphs 5 and 6).

If a settlor or beneficiary of a trust or similar legal arrangement is a person subject to an asset freeze under EU sanctions, any assets to be returned or distributed to this person should be immediately frozen.

Please note that these prohibitions apply for any trust or similar legal arrangement having as a trustor or a beneficiary any of the persons described in paragraph 1(a) to (e) that is:

- (a) Russian nationals or natural persons residing in Russia;
- (b) legal persons, entities or bodies established in Russia;
- (c) legal persons, entities or bodies whose proprietary rights are directly or indirectly owned for more than 50 % by a natural or legal person, entity or body referred to in points (a) or (b);
- (d) legal persons, entities or bodies controlled by a natural or legal person, entity or body referred to in points (a), (b) or (c); or
- (e) a natural or legal person, entity or body acting on behalf or at the direction of a natural or legal person, entity or body referred to in points (a), (b), (c) or (d).

3. Article 5m was amended by Council Regulation (EU) 2022/879 of 3 June 2022. What has changed?

Last update: 24 June 2022

Article 5m was amended in the following manner:

- The wind-down period in paragraph 3 was extended from 10 May 2022 to 5 July 2022. From 5 July 2022, it will be prohibited to provide trustee services to trusts or similar legal arrangements falling under the scope of Article 5m, paragraph 1.
- Where, in compliance with Council Regulation (EU) 2022/576 of 8 April 2022, the winding-down of a trust or similar legal arrangement was initiated before 11 May 2022, a national competent authority may authorise operations strictly necessary for the termination until 5 September 2022.
- A national competent authority may also authorise the provision of services if the trustee does not accept from or distribute assets to a trustor or beneficiary in paragraph 1 (a) to (e). This means that a trust or similar legal arrangement can continue to operate, for instance, where there are several beneficiaries including EU persons.
- The derogation foreseen in paragraph 6 (previously paragraph 5) for humanitarian purposes and civil society activities was expanded to cover the operation of trusts whose

purpose is the administration of occupational pension schemes, insurance policies or employee share scheme, charities, amateur sports clubs, and funds for minors or vulnerable adults.

- A new reporting obligation for Member States under paragraph 7, regarding any authorisation granted under paragraphs 5 and 6.

4. If beneficiaries of such trusts include both Russian nationals and non-Russian nationals, how should the prohibition be applied?

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The prohibition to register a new trust or provide trustee services only applies where a settlor or beneficiary is a Russian person as defined under paragraph 1 (a) to (e). Where applicable, these services could be provided or continue if these persons are removed from the trust or similar legal arrangement.

Furthermore, in accordance with Article 5m, paragraph 4, the prohibitions do not apply where a trust or similar legal arrangement has only one trustor or one beneficiary who is a national of a Member State or a natural person having a temporary or permanent residence permit in a Member State.

Finally, paragraph 5(b) provides that a national competent authority may also authorise the provision of services if the trustee does not accept from or distribute assets to a trustor or beneficiary in paragraph 1 (a) to (e). This means that a trust or similar legal arrangement can continue to operate, for instance, where there are several beneficiaries including EU persons.

5. Should trusts apply individually for a derogation or can a national competent authority provide an exemption for all trusts of a similar type, such as pension funds?

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National competent authorities should ensure that any authorisation granted fulfils the derogation conditions as laid down in Article 5m of Council Regulation 833/2014. Accordingly, the provision of any prohibited services to trusts or any similar legal arrangement falling under the scope of the Regulation should be authorised individually.

6. Do the prohibitions apply to dual nationals (having Russian nationality and the nationality of an EU Member State) as well as persons of Russian nationality who have a temporary or permanent residence permit in another Member State?

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Russian nationals falling under the scope of paragraph 1 (a) and (e) with dual Russian-EU nationality or having a temporary or permanent residence permit in a Member State can benefit from the exemption under Article 5m, paragraph 4.

The exemption provides that prohibitions do not apply where a trust or similar legal arrangement has only one trustor or one beneficiary who is a national of a Member State or a natural person having a temporary or permanent residence permit in a Member State.

For a dual national having both Russian nationality and a nationality of a country other than that of a Member State, the prohibitions in Article 5m apply.

For trusts with both Russian and non-Russian settlors or beneficiaries, we refer you to Question 4 of this FAQ.

7. Should undertakings for the collective investment in transferable securities (UCITS) or alternative investment fund (AIF) structures be deemed to be covered by the terms “trust or any similar legal arrangements” within the meaning of Article 5(m)?

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Whilst there exists a variety of trusts and legal arrangements throughout the Member States, the qualification of UCITS or AIF structures would need to be assessed on the merits of the specific circumstances, such as the nature, structure, administration function, location/custody of assets, discretionary/non-discretionary mandate of the fund in question and the beneficial owners of the assets.

Against this background, UCITS should normally not be deemed to be covered by the term “trust or similar legal arrangements” since UCITS is a regulated financial product. Accordingly, it should meet the requirements set out in Directive 2009/65/EC, must be authorised by a national competent authority (NCA) and be managed by an approved UCITS management company. Nevertheless, given that UCITS may be constituted in accordance with contract law (as common funds, including unit trusts managed by management companies), trust law (as unit trusts), or statute (as investment companies), it could prove relevant - especially where UCITS have been constituted in accordance with trust law - to assess UCITS structure or function, including the establishment of a fiduciary bond between parties and a separation or disconnection of legal and beneficial ownership of assets, etc.

As regards the use of AIF structures, there are no harmonised rules at EU level regarding the operation of AIFs. The generic term “AIF structures” may, in principle, be deemed to fall within the notion of “trusts or similar legal arrangements”. That is particularly relevant for situations where AIFs are constituted in accordance with trust law or contract law, for non-EU AIFs, AIFs with no legal personality, self-managed AIFs and certain offshore AIF structures of third countries which may happen to be largely unsupervised and non-transparent or non-reporting vehicles with opaque nature/function of the management mandate, assets and their location and/or beneficial owners. In this context, it is particularly relevant to refer to Article 12 of Council Regulation (EU) 833/2014, which seeks to prohibit activities the object or effect of which is to circumvent, prohibitions set out in that Regulation.

8. Should foundations be considered to fall under the scope of the prohibition?

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Foundations are regarded as the civil law equivalent to a common law trust, as they may be used for similar purposes. This equivalence is reflected in Directive (EU) 2015/849 which imposes on foundations the same beneficial ownership requirements as on trusts and similar legal arrangements. Accordingly, persons holding equivalent positions in foundations as settlors and beneficiaries should be construed as being subject to the same restrictions under Article 5m.