Intertrust

CORPORATE SERVICES
FUNDS
CAPITAL MARKETS
PRIVATE WEALTH

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# Regulatory Spotlight

Welcome to Intertrust's quarterly regulatory spotlight, highlighting and dissecting recent regulatory updates and developments affecting the financial services industry globally

CORPORATE SERVICES

# Regulation in the UAE

PATRICIA 'T HART VAN ROOIJEN, MANAGING DIRECTOR IN THE UAE

Over the years the UAE has gained world-wide popularity as a relocation destination. With its attractive Free Zone system, internationally recognised financial centres, extensive network of Double Tax Treaties and political stability, it's the go-to jurisdiction for a growing number of expats and corporates alike.

With Expo 2020 in sight, the UAE are experiencing a heightened global interest. Patricia 't Hart van Rooijen, Managing Director in the UAE, shares the latest regulatory updates in the region including Foreign Direct Investment, Economic Substance and visa rules.

## FINANCIAL CENTRES OF UAE

2018 saw an overhaul of Companies Law, and other related regulations, in the Dubai International Financial Centre (DIFC)[1]. Originally, the DIFC laws and regulations were predominantly based on the UK Companies Act 2006, with influences from related common law jurisdictions. The enactment of the new Companies Law DIFC Law No. 5 of 2018 (Companies Law) includes policy decisions on where to deviate or apply lighter touch than UK or other common law positions. Furthermore, it can be seen as part of a broader initiative in line with international best practices, providing a suitable regulatory framework by promoting shareholder and creditor protection whilst creating greater certainty and flexibility for companies.

The amendments made to the Ultimate Beneficial Ownership regulations (UBO regulations) is a response to increased focus by national authorities and global regulatory groups, to combat money laundering, terrorist financing, bribery and corruption. It's intended to safeguard and promote the DIFC's reputation as a stable and responsible financial centre, and to reinforce its commitment to adhere to the highest global standards.

The Abu Dhabi Global Markets Authority (ADGM) also recently adopted several amendments to their Commercial Legislation[2] in a bid to align with the international best practices. With the introduction of an Ultimate Beneficial Record and the rewording of the definition of the Beneficial Owner to include "any person who holds the position of officer of the company" the authorities wish to ensure transparency for all parties involved.

## 100% FOREIGN OWNERSHIP OF A MAINLAND COMPANY

Foreign companies seeking to establish an entity onshore in the UAE would previously have to team up with a UAE national, who was required to own 51% of the shares of the company. Following the enactment of the UAE Federal Law No 19 of 2018 on Foreign Direct Investment, a negative list of approximately 13 restricted sectors was published. In July of this year a total of 122 economic activities across 13 sectors were specified on a so-called positive list. These sectors are now to be eligible for up to 100% foreign ownership such as renewable energy, space, agriculture, and manufacturing industry. The decision provides investors with an opportunity to acquire various shares in a number of economic activities including the production of solar panels, power transformers, green technology, and hybrid power plants. "Our goal is to stimulate, activate and facilitate businesses..." HH Sheikh Mohammed tweeted, "we want to open and expand economic sectors".



### VISA RULES

On 31 March 2019, the UAE cabinet announced that it had amended the family visa rules. In a tweet the authorities confirmed that the new visa options were to ensure that "the UAE remains a global incubator for talents and a permanent destination for pioneers".

## Investors have the opportunity to acquire various shares in a number of economic activities

With the new retirement law of 2018 and the introduction of a long-term visa option in 2019, foreigners can work, live and study in the UAE without a need for a national sponsor. With a five year visa options and even a 10 year gold visa option the UAE are now open to investors, students, entrepreneurs, retirees and specialists.

### ECONOMIC SUBSTANCE RULES

The most recent law amendment can be seen as an affirmation of the path the UAE has chosen to follow. The clear wish to comply and align with global trends is also evidenced by the most recent enactment of the Economic Substance legislation, by Cabinet Resolution No. 31 of 2019, with the aim of being removed from the European Union's (EU) blacklist of uncooperative jurisdictions.

The UAE enacted economic substance rules on 30 April based on the EU recommendations outlined in the scoping paper issued by the EU Code of Conduct Group (COCG) on 22 June 2018 and OECD guidance on harmful tax practices in Action 5 of the Base Erosion and Profit Shifting (BEPS) action plan.

The legislation prescribes mandatory levels of substance for UAE corporates, including companies, branches and representative offices (including those based in any of the Free Zones) performing certain activities. Once it's established that the entity and its activity are in scope, the entity requires to pass a test demonstrating its economic substance.

In most jurisdictions, the enforcement of laws are ensured through a combination of financial sanctions for non-compliance, transparency and information exchange provisions and other corporate law mechanisms addressing corporate governance.

Clarifications on the procedures, templates and requirements for the reports and notifications haven't been provided but are expected to be released soon.

> "The UAE remains a global incubator for talents and a permanent destination for pioneers"

[1] *Non-exhaustive list of the new relevant Laws and Regulations: Companies Law DIFC Law No. 5 of 2018; Companies Regulations; Operating Law DIFC Law No. 7 of 2018; Operating Regulations; Ultimate Beneficial Ownership Regulations; DIFC Laws Amendment Law, DIFC Law No. 8 of 2018.*

[2] *Reference is made to the Commercial Licensing Regulations 2015, the Commercial Licensing Regulations 2015 (Conditions of License and Branch Registration) Rules 2019, Beneficial ownership and Control Regulations 2018 and Beneficial Ownership and Control 2018 (Amendment No. 1) Regulations 2019 and any and all other applicable law and regulations.*

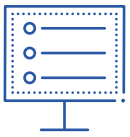
# Anti-money laundering: Dos and Don'ts

STEFFANY PRATCHER, VICE PRESIDENT AML REPORTING AND COMPLIANCE AND LAURA DA ASCENÇÃO, VICE PRESIDENT

Based on our experience working with clients on new Anti-money Laundering Regulations (AMLRs), Steffany Pratcher, Vice President AML Reporting and Compliance, and Laura da Ascenção, Vice President, provide their top tips to staying compliant and their pitfalls to avoid if your Cayman Islands entity is in scope for AMLRs.

## DO DETERMINE WHETHER YOUR ENTITY IS IN-SCOPE

In short, AMLRs require financial services providers (FSPs) engaging in relevant financial business to establish systems to detect things like money laundering and terrorist financing. Determine whether you're conducting relevant business by reviewing activities listed under Schedule 6 of the Proceeds of Crime Law.



## DO UNDERSTAND THE ACRONYMS

- AML: Anti-Money Laundering
- AMLCO: Anti-Money Laundering Compliance Officer
- MLRO: Money Laundering Reporting Officer
- DMLRO: Deputy Money Laundering Reporting Officer
- CFT: Countering Financing of Terrorism Act
- CIMA: Cayman Islands Monetary Authority
- KYC: Know Your Client
- PEP: Politically Exposed Persons
- SAR: Suspicious Activity Reporting

## DON'T FORGET TO FORMALLY APPOINT YOUR OFFICER

Ensure that the AML officers are formally appointed. If the FSP is a CIMA regulated entity, ensure that the AML officers' details are submitted to CIMA via its REEFs portal. The MLRO/DMLRO should communicate the procedure to report suspicious activities to the fund's employees and stakeholders.

## DO KEEP YOUR POLICIES AND PROCEDURES IN TIP TOP SHAPE

Your policies and procedures (P&Ps) should be reviewed by your AMLCO to ensure they're up to date and compliant. This includes those of the administrator in case of reliance. The AMLCO should also assess whether the administrator's AML standards are equal or lower to Cayman standards. Additionally, ensure that your AMLCO conducts an initial risk assessment of the entity and its structure, pursuant to AMLRs. Document and communicate the assessment to those charged with governance.

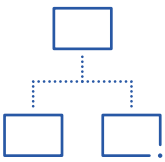
## DO INVITE YOUR AMLCO TO AT LEAST ONE BOARD MEETING YEARLY

Annual reporting is imperative. Including the AMLCO in board meetings ensures the annual report details any changes to the entity's risk assessment. The report should present the outcome of sample testing and the status of any remediation, if necessary. The AMLCO should also provide an update on regulatory changes and/or market trends.

## DON'T ASSUME YOUR AML OFFICERS ARE IN CHARGE OF COLLECTING DUE DILIGENCE ON YOUR INVESTORS

In practice, we've observed some FSPs assuming that the AML officers are in charge of collecting due diligence information on investors. It's the FSP who is ultimately responsible for ensuring all required due diligence is in place. Simply put, the FSP cannot delegate its regulatory responsibility.





## DO EMBED INTERNAL CONTROLS INTO YOUR ROUTINE

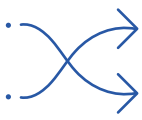
Applicable risks should always be assessed. If you outsource the AML officers functions, always assess the arrangement on the onset of the relationship and regularly ensure it is following outsourcing guidelines. Clearly state the obligations of both parties, including in the event of default, in an outsourcing agreement.

## DO ENSURE YOUR FSP IS COMPLIANT

Ask yourself:

- Does the entity have AML P&Ps?
- Is a proper audit/control function in place?
- Have AML officers been appointed?

In the event of an audit, it's helpful to have this information readily available.



## DON'T FORGET TO INFORM RELEVANT PARTIES OF ANY CHANGES

Ensure any changes are communicated to those charged with governance, should there be a change in circumstances, such as the resignation of an AML officer or changes to the P&Ps.

## DO HAVE A CLEAR UNDERSTANDING OF WHO YOUR SERVICE PROVIDER IS

Some things to think about:

- Are fees transparent?
- Are they experienced with qualifications in AML?
- Do they have a clear understanding of deadlines and service delivery expectations?

## DO REACH OUT TO US WITH ANY QUESTIONS

As experts in AMLRs with experience working with Cayman entities across the globe, we have the answers. Always consult an expert to make sure your entities are compliant and following the new and ever changing regulations.

We're gatekeepers. Focusing on compliance, business ethics and transparency, we take care of the legal administrative and regulatory duties of our clients. Get in touch to find out more.

# China's Silicon Valley: policy developments in the Greater Bay Area

JAMES DONNAN, MANAGING DIRECTOR HONG KONG

## INTRODUCTION TO THE GBA

The Greater Bay Area (GBA) is the Chinese government's development plan to integrate Hong Kong, Macau and nine cities in the Pearl River Delta (PRD), including Shenzhen and Guangzhou, into a leading economic and innovation hub for business growth.

The PRD in China has always been a dynamic region. It has been a test bed for market reform in China since the 80's, which has helped it attract the lion's share of Foreign Direct Investment over the years, while also creating some of China's most innovative and successful home-grown companies (Tencent, Ping An, Huawei, BYD & DJI). Now with the extra ingredients that come along with the GBA initiative, the true potential of this region will be unleashed, creating exciting opportunities for business growth and investment.

## STAGGERING STATISTICS [1]

- With a combined population of 71 million, the GBA is larger than the UK and France
- At USD 1.6 trillion, the GBA economy is twice the size of the Netherlands, and makes up 13% of China's GDP
- Covering a land area of 57,000 square kilometres, it's three times the size of the San Francisco Bay area

Despite these staggering statistics, the GBA still only makes up 5% of China's total population, a fraction of the landmass, and has a nascent services sector. This demonstrates both its current economic efficiency as well as its future growth potential.

## SECTOR OPPORTUNITIES

Innovation and technology will underpin the GBA, as it seeks to become China's "Silicon Valley". However, each city will be rolling out a range of sector-specific initiatives to enhance their own unique strengths and in turn attract investment. For example:

- Hong Kong will be the finance and legal arbitration hub
- Shenzhen will be the centre for innovation and R&D
- Guangzhou will lead the way for integrated transportation
- Dongguan will focus on high end manufacturing and services
- Macau will be the tourism and leisure hub

→ **Practical insights:** We're already seeing an uptick in activity and investment through our three GBA offices. From a sector perspective technology is the main focus area, covering advanced manufacturing, smart cities

and biotech. Meanwhile, private equity and venture capital funds are increasingly focusing on the region to deploy capital. We're also seeing a lot of activity around real estate and infrastructure investment as the physical development of the region starts to take shape. Inevitably valuations of assets will rise over time, so smart entrepreneurs are already looking to get an early foothold and tap into the future growth opportunity.

## THE 'EXTRA INGREDIENTS' OF THE GBA

While the initial blueprint was scant on detail, some of the key initiatives are likely to include:

- Regulatory harmonisation across cities and regions
- Continued connectivity of financial markets and physical infrastructure
- Greater currency convertibility to facilitate cross-border investments and financing activities
- Simplified IPO exit routes for GBA-domiciled companies
- Further enhancement of the HK-SZ Stock Connect
- Launch of R&D centres and innovation communities (e.g. Lok Ma Chau loop)
- Amended rules to facilitate immigration and customs clearance to allow for freer flow of talent and goods within the region

## ECONOMIC AND GEOPOLITICAL RISKS

While there are certainly emerging macroeconomic and geopolitical headwinds companies need to be preparing for, the long-term fundamentals around Chinese investment remain sound. Domestic consumption remains a policy priority, and proactive measures are being taken to support it. In doing so, the 400 million (and growing) middle class in China will help buffer the impact of these headwinds, and continue to create tremendous opportunities for foreign companies and investors in the GBA and beyond.

→ **Practical insights:** When we speak to our clients on their outlook for China, it's clear that, despite all the current uncertainty, sentiment remains strong. Many of our clients tell us that they expect their investment activity into China to increase over the next 12 months, while most expect to do more investments specifically into Southern China as a result of GBA.

## HONG KONG & SHENZHEN'S ROLE IN THE GBA

Under "One Country, Two Systems", Hong Kong operates as a Special Administrative Region with a separate legal system, tax framework and currency which has helped position it as a leading International Finance Centre and support the flow of capital into and out of China.

Meanwhile, Shenzhen is positioned to be the 'hotbed' for innovation and has the added benefit of being 'onshore' with direct access to the domestic consumer base. Because of this, investors will increasingly invest into Shenzhen, but via Hong Kong. Furthermore, Shenzhen has been positioned as China's onshore city to drive financial market reform and liberalisation. Increasingly, Shenzhen will be given more autonomy to drive such reform and pave the way for a freer and more dynamic economy.

Together, Hong Kong, Shenzhen and the other cities in the GBA can complement each other and add tremendous value across the full lifecycle of investment and growth in the region.

→ **Practical insights:** In July 2019, Intertrust opened up an office in Shenzhen, our fourth office in Mainland China. Not only do we see the tremendous future potential of GBA, but we are already being driven by existing client demand (both inbound and outbound). We expect this trend to continue, and we want to be well positioned across the GBA with offices in Hong Kong, Guangzhou and now Shenzhen.


With a combined population of 71 million, the GBA is larger than the UK and France


At USD 1.6 trillion, the GBA economy is twice the size of the Netherlands, and makes up 13% of China's GDP


Covering a land area of 57,000 square kilometres, it's three times the size of the San Francisco Bay area

*This article has been initially written by James Donnan for the Dutch Chamber of Commerce in Hong Kong's "DutchCham Magazine"*

[1] *Deloitte Research and HKTDC Research, 2019*

# Introduction of trust law in Switzerland

JURGEN BORGT, MANAGING DIRECTOR SWITZERLAND

The Swiss trust law has been a long time in the making. Since the ratification of the Hague Trust Convention in 2007 several attempts were made by interested parties to come to legislation on the proper Swiss trust; thus far unsuccessful. However, this may (soon) be changing.

## BACKGROUND

With the 2007 ratification by Switzerland of the Hague Trust Convention, for the first time, trusts would be recognised as such in Switzerland. The chosen law of the trust would be accepted by Swiss courts. Besides, it was then possible to opt for Swiss jurisdiction. This was undoubtedly progress for Swiss-based trust practitioners such as Intertrust.

This did not mean, however, that there was such a 'thing' as the Swiss trust. As early as 2009/2010, attempts were made by members of parliament to come to a Swiss trust law (the Law). In 2015 a motion was introduced to review the possibility of a Law, but again no joy. In 2016 a member of parliament submitted an initiative promoting the introduction of the Law with success and in 2018/2019 the Swiss Parliament adopted the motion requesting the Swiss Federal Council to start the project of introducing the Law.

## WHERE ARE WE NOW?

Currently, an expert commission is reviewing the legal and regulatory framework. At the same time, an external group is conducting a regulatory impact assessment, which is expected to produce its report later this year.

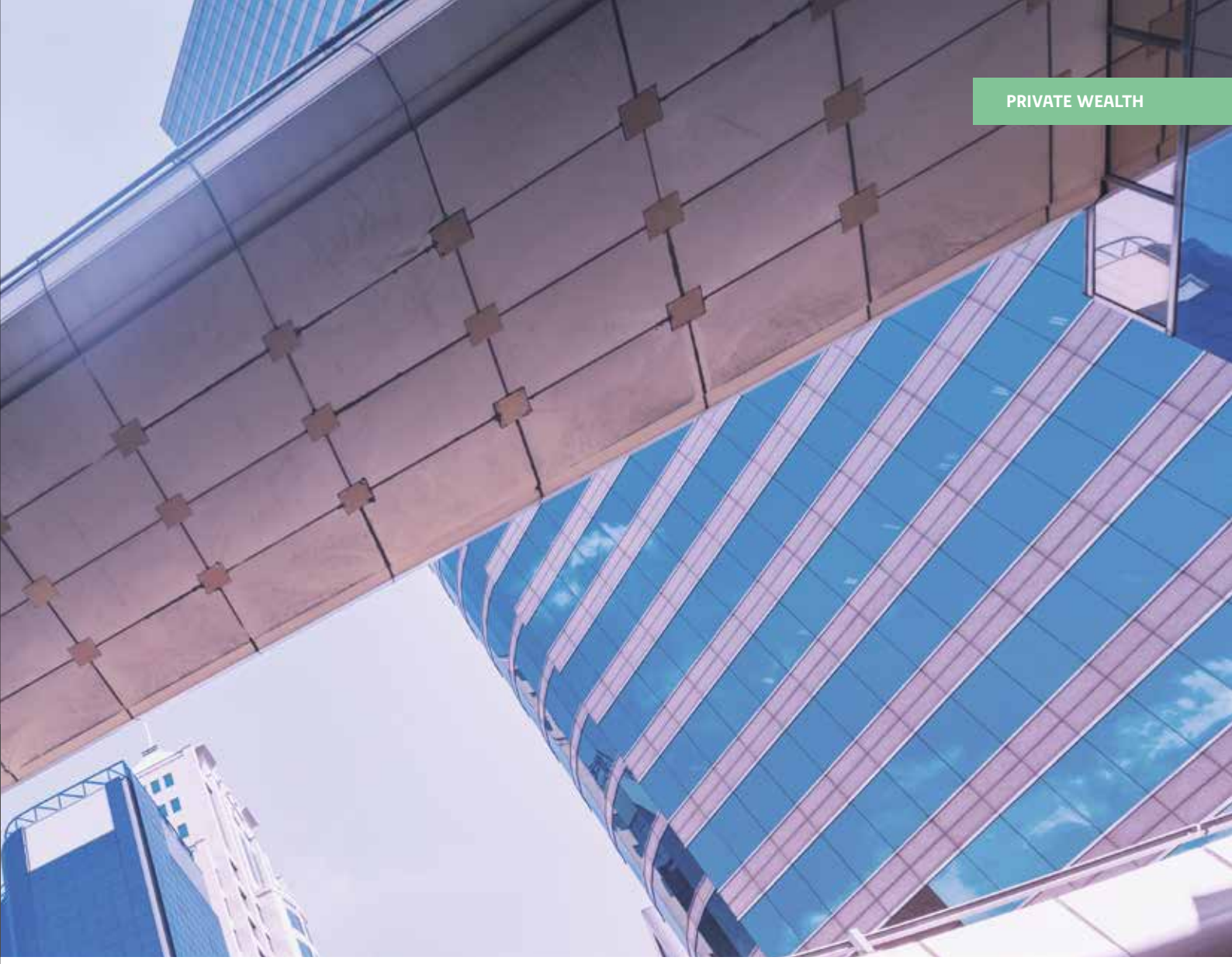
## THE LAW – WHAT YOU NEED TO KNOW

First and foremost, with the introduction of the Law, it will become possible to settle a trust in Switzerland under Swiss law. Until such time, trusts 'in Switzerland' will be settled under a foreign law (e.g. English law).

Swiss trusts will most likely be of the type 'express' and used for wealth management and estate planning situations.

As the trust concept was established under common law it may prove difficult to convert the trust concept into Swiss law, which is a civil law jurisdiction. Swiss legal scholars and advisors have been discussing the possible models for a while now. They vary from the common law model on the one side through the foundation model to the fiduciary contract model on the other.

For Swiss nationals and residents, it's important not to forget forced heirship rules, which now cannot be 'neutralised' by making use of a trust, be they Swiss or otherwise.



## WHAT WILL IT MEAN FOR SWITZERLAND?

The original intention seems to have been to introduce an additional option for Swiss nationals and residents. The debate among legal scholars and advisors appears to focus on whether or not that was really necessary. With the already existing Swiss foundation, business holding foundation, family foundation, usufruct and fiduciary contract some believe there are already plenty of options. Perhaps not perfect, but still there. Service providers, trustees, asset managers and the like focus on the addition of a product; another 'arrow in the quiver' of the Swiss market place. Time will only tell whether or not it'll be a boon.

## HOW CAN WE HELP?

Upon acceptance of the Law we're on hand to answer your questions and review possible structuring opportunities with you and your advisors.

> "With the introduction of the Law, it'll be possible to settle a trust in Switzerland under Swiss Law"

Service providers, trustees, asset managers and the like focus on the addition of a product; another 'arrow in the quiver' of the Swiss market place

# DAC6: a brave new world of transparency

CHARLOTTE PHIPPS-HORNBY, DIRECTOR BUSINESS DEVELOPMENT, PRIVATE WEALTH

Tax transparency has become ubiquitous. Since the leak of the Panama Papers in 2016, the global call for greater transparency of offshore tax structures has intensified. In particular, DAC6 disclosure requirements increases the transparency of private wealth holding structures in a Member State.

On 25 May 2018, the Council of the European Union (EU) amended Directive 2011/16/EU informally known as 'DAC6' (Sixth version of the EU Directive of Administrative Cooperation). DAC6 is the requirement for the reporting of European transactions or arrangements which are defined as 'tax aggressive' with an EU cross-border element by intermediaries.

Notwithstanding Brexit, it's anticipated that the UK will implement the Directive in to UK legislation by 1 July 2020.

The Crown Dependencies aren't part of the EU so don't fall directly under DAC6's remit yet. In a further show of compliance and cooperation, they've announced that they'll introduce the legislation by the end of the year that implements mandatory disclosure rules aligned to DAC6.

## REPORTING REQUIREMENTS

DAC6 requires EU intermediaries to file information on Reportable Cross-border Arrangements to their local tax authorities. Where the intermediary asserts legal professional privilege or no EU intermediary is involved, the EU taxpayer has an obligation to self-report. Failure to submit will result in penalties.

If there are no intermediaries that can report, the obligation is on the taxpayers.

## HALLMARKS – WHAT'S A REPORTABLE ARRANGEMENT?

An arrangement will be reportable if it meets at least one of five Hallmarks, which are categorised as follows:

1. Generic hallmarks linked to the main benefit test
2. Specific hallmarks linked to the main benefit test: this includes certain tax planning features, such as buying a loss-making company to exploit its losses in order to reduce tax liability.
3. Specific hallmarks related to cross-border transactions (some of these hallmarks are linked to the main benefit test)
4. Specific hallmarks concerning automatic exchange of information and beneficial ownership
5. Specific hallmarks concerning transfer pricing

### 'MAIN BENEFIT' TEST

The 'main benefit' test means that one of the main objectives of the arrangement is to obtain a tax advantage.

### WHO IS AN INTERMEDIARY?

A qualifying intermediary, which can be either an individual or a company, includes, but isn't limited to, lawyers, accountants, corporate services companies, banks, holding and group treasury companies etc.

*Intermediaries, who sell reportable cross-border tax arrangements to their clients, should report information on the arrangement to the tax authorities of their home Member State.*

*An intermediary is also any person that provides, directly or by means of other persons, aid, assistance or advice with respect to designing, marketing, organising, making available for implementation or managing the implementation of a reportable cross-border arrangement*[4].

Where there's more than one intermediary, the reporting obligation lies with all intermediaries involved in the arrangement. In this case one unique reference number should be included on all exchanges so that they can be linked to a single arrangement.

It's important that discussions between all stakeholders begin as early on in the legislative process as possible

**25 June 2018**

DAC6 implemented with retrospective effect

**31 December 2019**

Member States must adopt and publish the laws, regulations and administrative provisions for DAC6 compliance

**1 July 2020**

all member states must have transposed DAC6 into national legislation

**31 August 2020**

final date for disclosure from the transitional period (25 June 2018 – 30 June 2020)

**31 October 2020**

1st automatic exchange of information

### PRACTICAL STEPS TO CONSIDER

It's important that discussions between all stakeholders begin as early on in the legislative process as possible. In practical terms:

- identify what needs to be reported, who needs to report and to whom
- speak to your advisor(s) to agree who'll be responsible for filing the information
- collate and store the data that needs to be reported

We provide mandatory disclosure reporting services, using a state of the art online reporting tool, and we'll continue to monitor the implementation of the Directive in all EU Member States so you can focus on your business. If you'd like any further information on how we can help, or have any questions on the Directive and its potential implications, please get in touch.

> "DAC6 is the requirement for the reporting of European transactions or arrangements which are defined as 'tax aggressive' with an EU cross-border element by intermediaries"

[4] *https://ec.europa.eu/taxation_customs/sites/taxation/files/dac-6-council-directive-2018_en.pdf*

# STS securitisation rules bring tough new disclosure demands

ARNO VINK AND EDWIN VAN ANKEREN, CAPITAL MARKETS NETHERLANDS

The EU Securitisation Regulation took effect on 1 January 2019, bringing a new Simple, Transparent and Standardised (STS) label for securitisations that meet strict eligibility criteria. Arno Vink and Edwin van Ankeren, Capital Markets Netherlands, discuss what the new regulation and STS designation mean, and how firms can satisfy their expanded disclosure obligations.

The Securitisation Regulation seeks to enhance the safety, liquidity and harmonisation of Europe's securitisation market, and is a cornerstone of the EU's Capital Markets Union. To further these goals, the STS designation has been introduced to differentiate simple products from more opaque and complex ones, and make it easier for investors to understand and assess the risks of investing in a securitisation.

One potential advantage to STS status is that credit institutions and investment firms exposed to them may be eligible for preferential capital treatment under the Capital Requirements Regulation. Perhaps more importantly, the STS label is emerging as a market standard that will help attract investor interest.

Year to date, there have been 46 STS notifications of securitisation transactions, split six private and 40 public transactions. Out of the public transactions eight transactions were closed in 2018 (source: ESMA).

## SECURITISATION REGULATION & STS TRANSPARENCY REQUIREMENTS

The Securitisation Regulation imposes strict disclosure requirements (set out in Article 7 and the draft regulatory and implementing technical standards) on all securitisation transactions originated as of 1 January 2019. The disclosures must include detailed information on underlying exposures, along with investor reports.

To be designated STS, a securitisation must comply with close to 100 additional criteria set out in Articles 20–22 of the regulation. Transparency and reporting rules form a key part of those criteria – requiring originators, sponsors and securitisation special purpose entities to make information on the transaction and underlying exposures available to securitisation holders, competent authorities and, upon request, potential investors.

**To satisfy the disclosure rules, institutions have to:**

- **Compile the reporting templates**

  Detailed information (which varies by asset class) must be disclosed for each transaction. The information will be transmitted using standardised disclosure templates developed by ESMA (once the incoming European Parliament ratifies them, which is expected sometime in Q4 2019 or Q1 2020). Reporting parties therefore need to interpret the new technical standards, definitions and template fields to determine what should go into them.

  Applicable CRA3 templates are being used until ratification takes place.

## The Securitisation Regulation seeks to enhance the safety, liquidity and harmonisation of Europe's securitisation market

- **Assimilate data for different asset classes**

  For certain asset classes, more information must be reported than previously. Sourcing and reporting relevant historical data may be problematic if parties have never reported on, say, energy labels within residential mortgage-backed securities. Similarly, CLO transactions are now included in the regulation's reporting requirements where they weren't before.

- **Populate templates with standardised data**

  The regulation seeks to make transactions comparable by ensuring all data is calculated and presented in the same way. Where differences currently exist – for example, in how mortgage originators present performance data such as arrears or losses – that data must be translated into the prescribed standard, as mentioned above.

  The disclosure requirements also extend beyond completing the reporting templates. For example, firms need to disclose transaction information to the market pre- and post-closing to enable (potential) investors to perform their due diligence obligations.

In time the information will be disclosed via a registered securitisation repository, but as yet ESMA has no powers to assess repository applications.

### MEETING THE REPORTING DEMANDS

The skills and infrastructure needed to fulfil the disclosure obligations pose significant challenges.

> "The STS label is emerging as a market standard that will help attract investor interest"

Creating an efficient, automated and robust reporting infrastructure takes knowledge and investment. With reporting volumes set to rise – as new securitisations continue to grow, and many parties amend pre-2019 transactions to make them STS compliant – firms' infrastructures and processes will also need built-in scalability to cope.

Time-to-market is another consideration. Securitising parties need to prepare the templates and collate information for the applicable asset classes before they can launch any STS transactions. Subsequent updates or changes to technical standards must then be monitored and quickly incorporated.

Complying with the STS rules is no easy task. But as the label develops into a market standard, securitisations that meet the rules should gain favour among investors.

## We've been working closely with industry bodies to implement the new STS transparency requirements and developed proprietary technology for seamless reporting. Contact us to learn how we can help clients meet their disclosure responsibilities.

# Cayman Islands Data Protection law takes effect

LESLEY CONNOLLY, REGIONAL HEAD OF REGULATORY COMPLIANCE SERVICES AND OPERATIONS IN CAYMAN

The Data Protection Law, 2017 (the "Law") came into effect on 30 September 2019 and Lesley Connolly, Regional Head of Regulatory Compliance Services and Operations, shares all you need to know about this new law.

The Law, which focuses primarily on the protection of personal data, introduces eight data protection principles, grants various rights to data subjects, imposes various obligations on data controllers (including as relates to notification of personal data breaches), creates offences and sets out the enforcement measures for non-compliance (including imprisonment and significant fines and penalties), and establishes the functions of a Commissioner. The Law adopts many approaches and definitions from the European Union's General Data Protection Regulation (GDPR), which does not directly apply to individuals and businesses within the Cayman Islands, and the additional requirements of the GDPR will constitute best practice in the Cayman Islands.

While penalties for breaches are not in the range of those levied by GDPR, they're significant. Read on to understand the scope, application, penalties for breaches and next steps to take if your business processes personal data in the Cayman Islands.

## APPLICATION AND SCOPE

The Law applies to data controllers that are (i) established within the Cayman Islands and processing personal data in the context of that establishment, or (ii) established outside the Cayman Islands but processing personal data within the Cayman Islands. Cayman Islands companies, partnerships and foreign companies are treated as being established within the Cayman Islands, as are any persons carrying on any activity through an office, branch or agency or regular practice.

It's important to seek appropriate Cayman Islands advice with a view to a ascertaining its status as data controller or data processor

## DATA PROTECTION PRINCIPLES

The data protection principles, in summary, require the personal data to be (i) processed fairly, (ii) obtained for one or more lawful purpose, (iii) adequate, relevant and not excessive for such purpose, (iv) accurate and kept up to date, (v) not kept for longer than is necessary for such purpose, (vi) processed in accordance with the rights of the data subject under the Law, (vii) protected, through appropriate technical and organizational measures, against unauthorised or unlawful processing and against accidental loss, destruction of damage, and (viii) not transferred to a country or territory unless such country or territory ensures an adequate level of protection to data subjects.

## RIGHTS OF DATA SUBJECTS

The rights of data subjects under the Law include (i) the right to be informed by a data controller whether his/her personal data is being processed and to be provided with certain information relating to the personal data being processed and a copy of such personal data, (ii) the right to require a data controller to cease processing (including for a specified purpose or in a specified manner) or not to begin processing his/her personal data, (iii) the right to require a data controller to cease or not to begin processing his/her personal data for the purposes of direct marketing, and (iv) the right to require a data controller to ensure that it takes no decisions that significantly impacts him/her based solely on processing by automatic means his/her personal data.

A data subject is able to make an application to the Commissioner for an enforcement order where the data controller fails to comply with a request or notice made by a data subject. The Commissioner has been granted broad enforcement powers and, in addition to requiring a data controller to take steps or refrain from taking steps in relation to processing personal data, can do anything that appears to the Commissioner to be incidental or conducive to the carrying out of its functions under the Law. The Commissioner may issue an order requiring a data controller to rectify, block, erase or destroy personal data and notify third parties to whom such data had been disclosed of the rectification, blocking, erasure or destruction.

Failure to comply with an information requirement, enforcement order or monetary penalty order made under the Law is an offence, which carries liability on conviction to a fine of approximately US$120,000 and/or imprisonment for five years.

### PERSONAL DATA BREACH

The Law requires that, in the event of a personal data breach, the data controller notify the relevant data subject and the Commissioner without undue delay and within five days. A notice of a personal data breach is required to describe (i) the nature of the breach, (ii) the consequences of the breach, (iii) the measures proposed to be taken to address the breach, and (iv) the measures recommended by the data controller to the relevant data subject to mitigate the possible adverse effects of the breach.

Failure to comply with the provisions relating to the notification of personal data breaches is an offence, which carries liability on conviction to a fine of approximately US$120,000.

### OTHER OFFENCES AND ENFORCEMENT POWERS

The Law creates various other offences, including in relation to obtaining, disclosing and procuring the disclosure of personal data without consent of the data controller and sale of personal data.

It's important to note that a director, secretary or similar officer of a body corporate (and any person purporting to act in any such capacity), which has committed an offence under the Law, also commits the same offence if it's proven that the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, such director, secretary or officer.

The Commissioner has the power to impose a monetary penalty on a data controller if the Commissioner is satisfied that there has been a serious contravention of the Law and such contravention was of a kind likely to cause substantial damage or distress to the data subject. The maximum penalty permitted under the Law is approximately US$300,000.

> “The Law adopts many approaches and definitions from the EU's GDPR”

Unless otherwise provided in the Law, an offence under the Law attracts a fine of approximately US$12,000 on summary conviction or approximately US$24,000 on indictment. Fines imposed under the Law are in addition to the monetary penalty mentioned above.

## NEXT STEPS

Any person who processes (or who is not certain that he/she does not process) personal data, whether individually, through a company or partnership formed or registered in the Cayman Islands, or otherwise within the Cayman Islands, should:

- seek appropriate Cayman Islands advice with a view to ascertaining its status as data controller or data processor
- determine and document what personal data is being processed, how and why
- establish policies and procedures to govern data processing activities and ensure compliance with the Law
- create a privacy notice to inform clients and employees, if applicable, of the type of data held and the purpose(s) for which such data is being held
- if not established in the Cayman Islands, appoint a local representative

## DATA PROTECTION AND PRIVACY AT INTERTRUST

We understand that your privacy is important. Therefore, we respect and protect your right to privacy and will process your personal data in accordance with the provisions of the GDPR and the Law.

> “The Commissioner has been granted broad enforcement powers and can do anything that appears to be incidental or conducive to the carrying out of its functions under the Law”

# Navigating a shifting regulatory landscape – the importance of risk management

ADELA BAHO, HEAD OF RISK MANAGEMENT AIFM IN LUXEMBOURG

Adela Baho, Head of Risk Management AIFM in Luxembourg, discusses the importance of risk management and the ideal risk framework for alternative assets.

**What is the main feature of your funds?**

The funds managed by our AIFM cover a wide range of investment strategies including private equity, real estate, private debt, infrastructure, fund of funds and hedge funds.

**Amongst the strategies you cited, what are the ones investors are mostly looking for today, and why?**

Investors are turning to alternative assets in search of higher yield, better diversification and lower risk than the ones offered by traditional asset classes. As recently announced by the FED and the ECB, yields are going to remain lower for longer, with negative yielding debt hitting new records. One of the outcomes of this situation is the increasing share of investments in private debt, private equity and infrastructure assets. The inclusion of the alternative assets, from the investors' perspective, has been beneficial to the risk-adjusted performance of the overall portfolio, and this in both pre- and post- global financial crisis macro-regimes. This broadly diversified portfolio has shown a lower volatility and therefore higher risk-adjusted returns when measured by the well-known measure of the "Sharpe Ratio".

**Risk management being one of the core functions of the AIFM, in your opinion, how should the "ideal" risk management framework look for your above-mentioned strategies?**

Well, it depends on the strategy. We apply a customised risk assessment for each asset class, at initial investment and on an ongoing basis following the valuation cycle. In any case, it's widely accepted that the aim of risk management is to use a forward-looking approach when assessing the risks. In my opinion, the approach to follow should include both top-down and bottom-up.

> In the current economic cycle companies tend to increase the leverage, particularly those involved in buyout activities

The former consists of estimating returns and understanding the behaviour of the fund, that is the main determinants of the investment decision including leverage, over-performance versus the risk-free rate and the decomposition in systematic and idiosyncratic risk elements. It's worth noting that most of academic research and market practice also focuses on the aggregated fund level. We aim at improving that by using a bottom-up approach looking at the target investment. As an example, if we take the private debt case, though it remains challenging to obtain the data, the bottom-up risk assessment shall focus on the performance of the target company. We need to know the financial health of the company, that is if the firm has the ability to generate enough cash flows in order to pay back its debt and eventually decrease leverage risk, or what is the chance that the company may go out of business before the loan maturity is reached or before the exit of the investment. Without going into details, the family of credit default models such as Merton structural model can be used.

**What is your overall view on the changing economic situation and potential impact in the private equity space?**

Well, in the current economic cycle, that is low or even negative real interest rates, low inflation and cheap credit, companies tend to increase the leverage, particularly those involved in buyout activities. The procyclicality feature of the investment in private equity increases the challenge of the asset class to continue to provide high level of returns. This is because during good times there will be both good and bad projects to be financed and liquidity, including cheap credit, is currently available for transactions. The level of dry powder is at its highest level since 2000, increasing even exponentially for the buyouts since 2012 (according to Preqin).

**What are hidden risk management challenges facing the alternative asset class?**

The recent growth in capital committed to the asset class has come at the same time as the increase in regulation and more stringent investor protection. It has become crucial to better control the risk factors of the asset class, and consequently be better prepared to be insulated from potential systematic risk or financial distress. Certainly, we can think of diversification principles at both, the fund and Limited Partners (LPs) level. In our risk management process, we don't consider, at least at this stage, the LPs' asset allocation decision making process.

However, what we observe at the fund level is that the diversification doesn't constitute the control variable during the asset allocation process but is instead the result of investment opportunities that arises to the GP when making investment decisions. It is worth noting that this observation is supported by empirical findings in the academia in both forms of capital raising, ex-ante commitment and deal by deal financing. We aim at designing a framework able to provide more transparency for investors, reduce information asymmetry by minimising the well-known principal-agent problem, that's the trade-off between risk and incentives between investors and fund managers.

In this environment we mitigate the risks by optimising the contractual set-up and review thoroughly all management and partnership agreements from risk management perspective.

At Intertrust, we launched our latest research report 'Navigating a shifting regulatory landscape', surveying 115 alternative investment fund managers from across Europe, North America and Asia to find out their views on how AIFMD has impacted managers' ability to market AIFs across Europe, how effective the Directive has been and the challenges managers have faced.

If you would like to receive a copy of the full report, please get in touch with us.

*This article was initially published in AGEFI Luxembourg.*

> “In the current economic cycle companies tend to increase the leverage, particularly those involved in buyout activities”

# About Intertrust

Intertrust is a global leader in providing tech-enabled corporate and fund solutions to clients operating and investing in the international business environment. The Company has more than 3,500 employees across 30 jurisdictions in Europe, the Americas, Asia Pacific and the Middle East. Intertrust delivers high quality, tailored corporate, fund, capital market and private wealth services to its clients, with a view of building long-term relationships.

The Company works with global law firms and accountancy firms, multinational corporations, financial institutions, fund managers, high net worth individuals and family offices.

3,500+ employees

30+ jurisdictions

65+ years' experience

## Contact us

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