

THE FIFTH EU ANTI-MONEY LAUNDERING DIRECTIVE – THE NEW TRUST REGISTRATION REQUIREMENT AND WHAT IT MEANS FOR BUSINESS

The new EU Anti-Money Laundering Directive (AMLD5)¹ will require trustees of express trusts to register information on the beneficial ownership of the trust in a central national register. In a major change from the current rules, the new rules will apply to all express trusts – new and pre-existing – not just those that have tax consequences.

Trusts are used every day under English law in everything from residential property transactions to corporate acquisitions. They have a particularly important role in financial market transactions governed by English law – many bond issues rely on a trustee to protect the interests of bondholders, secured lending transactions often rely on a trustee to hold security for multiple creditors and every bank or investment firm holding securities in custody for clients does so on trust.

AMLD5 therefore presents a challenging and onerous task for businesses – to identify all such trusts and register their beneficial ownership by no later than 10 January 2020 (the date by which Member States must bring their implementing rules into force) as well as to build the appropriate systems to comply with the registration obligation for all new trusts.

This briefing explains how the new rules work and what steps corporate trustees and other businesses should be taking now.

AMLD 5 (2018)

- AMLD5 requires that trustees of express trusts must disclose beneficial ownership data to central national registers, regardless of whether the trusts generate a tax consequence.
- Member States must implement the new rules by 10 January 2020.

AMLD 4 (2015)

- AMLD4 requires that trustees of express trusts keep records of beneficial ownership information and make certain disclosures to counterparties.
- Trustees must disclose that information to a central register when the trust generates tax consequences.
- Member States were required to implement these rules by 26 June 2017.

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, and amending Directives 2009/138/EC and 2013/36/EU.

WHAT DOES AMLD4 CURRENTLY REQUIRE?

There has long been a concern that trusts can be used for money-laundering. Hence the European Commission's initial proposal for the Fourth Anti-Money Laundering Directive (AMLD4) would have required trustees to identify the existence of any express trust governed by the law of a Member State for which they had responsibility, maintain records of the identity of the beneficiaries, make certain disclosures to counterparties and register the information on beneficial ownership in publicly available registers. The intention was to enable law enforcement authorities and regulators to monitor and, if necessary, take enforcement action against any trust arrangements which were used to launder the proceeds of unlawful activities.

This proposal caused concern because of the abundance of trusts in common law jurisdictions in both commercial and personal life. As noted above, their use is widespread in securities markets and lending transactions governed by English law. In other cases, trusts are used simply as a drafting technique to address particular commercial issues, for example so called 'turnover trusts' requiring parties to finance agreements to account to one another for proceeds which they receive outside the terms of their agreement. Trusts are also widely used in personal transactions. For example, almost every sale of residential property in England results in the creation of at least one trust. Therefore, while the proposals also applied to other types of legal arrangements having a structure or functions similar to trusts, it was clear that the registration requirement would have a disproportionate impact in common law jurisdictions and, in particular, in the UK.

These concerns led the UK Government successfully to seek amendments to the proposal so that AMLD4 now only requires registration for express trusts and other similar arrangements that generate tax consequences. Generally, the examples above will not have that effect in the UK – tax consequences are usually only relevant to family trusts or settlements and such arrangements were already subject to UK tax reporting rules. Thus, adding a new registration requirement was not thought to be very onerous. In addition, the final form of the directive limited access to the register to the authorities and entities subject to anti-money laundering obligations.

AMLD4 does impose other obligations that apply to trustees of all express trusts and other similar arrangements. They must keep written records of beneficial ownership (which must be available to the authorities) and, when they enter into transactions or business relationships with entities subject to anti-money laundering obligations under the directive, they must inform their counterparty that they are acting as trustee and provide information on beneficial ownership to the counterparty in a timely manner. In the UK, these obligations are set out in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 which took effect from 26 June 2017 and which also established the central UK register for reporting beneficial ownership information for taxable trusts.

The UK Regulations also address (without fully clarifying) the issue of the extent of the obligations of a trustee's record keeping, notification and (where applicable) registration obligations in relation to trusts with a fluctuating class of beneficiaries (such as the bondholders or lenders from time to time under bond issue or loan security trust). In many cases the trustee will not know the identity of all the beneficiaries at any one time (e.g., because they hold their interests through a clearing system) or it would be simply impractical for the

trustee to keep a central register up to date with a constantly fluctuating body of beneficiaries (e.g., because those interests are traded in the market).

WHAT WILL AMLD5 REQUIRE?

The European Commission's legislative proposal for AMLD5 reopened the issue of whether the registration obligation should extend beyond taxable trusts and this extension was endorsed (with some modifications) by the European Parliament and the Council.

The revised obligations will apply to trustees of express trusts administered in a Member State (regardless of the governing law of the trust). These trustees will have to keep records of beneficial ownership and disclose their status and beneficial ownership information to counterparties in much the same way as currently required.

However, AMLD5 will now extend the registration obligation to the trustees of all express trusts, regardless of whether they have taxable consequences. The trustee must register the beneficial ownership information at the central register in the Member State in which the trustee is established or resides (and keep that information up to date).

AMLD5 does not contain any provision "grandfathering" existing trusts. Thus, it appears that, when a Member State brings its implementing laws into force, trustees will need to register beneficial ownership information on all existing trusts as well as new trusts created after the legislation comes into effect.

AMLD5 will also extend the registration obligation to non-EU trustees of express trusts which form a business relationship or acquire real estate in a Member State.

In a similar way to the current directive, AMLD5 applies the same obligations to persons holding equivalent positions in other types of legal arrangements having a structure or effect similar to trusts (such as *fiducie* and certain types of *Treuhand* or *fideicomiso*). Member States must notify the European Commission by 10 July 2019 of the relevant types of these legal arrangements governed by their law and the Commission will publish a consolidated list by 10 September 2019.

The directive also extends access to a central register by allowing anyone to access the information on the register if they can demonstrate a legitimate interest or where a trust has direct or indirect controlling interests in certain companies (subject to the possibility of case-by-case exceptions where beneficial owners might be put at serious risk). Member States may choose to make the information available more broadly. The registers will be interconnected across Member States through a common platform. The directive does not specify any minimum safeguards that Member States should apply to protect the security and confidentiality of sensitive commercial or personal information filed on the register (for example, details of a bank's custody clients), other than requiring that access must be in accordance with data protection rules.

Member States are required to ensure that breaches of these obligations are subject to effective, proportionate and dissuasive measures or sanctions. For example, the current UK implementing regulations allow the UK authorities to impose criminal or administrative penalties and other administrative sanctions on trustees that fail to comply with the requirements.

WHEN WILL THE NEW OBLIGATIONS APPLY?

AMLD5 provides that Member States must bring into force the necessary implementing laws and regulations by 10 January 2020. Member States can also act sooner and so the rules may apply from an earlier date in some Member States.

The UK is expected to withdraw from the EU in March 2019. However, the text of the withdrawal agreement agreed so far between the UK and the EU includes a transitional or implementation period ending on 31 December 2020, during which the UK would be required to implement EU directives such as AMLD5. Therefore, it is prudent to assume that the UK will implement the new rules during 2020 as if it were still a Member State.

WHAT STEPS SHOULD TRUSTEES AND BUSINESSES BE TAKING NOW?

The new rules present a very significant implementation challenge to corporate trustees and other businesses that are established or resident in the UK or another Member State. They will need to track down and identify each and every outstanding agreement or other instrument that creates a trust or similar arrangement and ensure that they are in a position to comply with the registration obligation when the new rules come into force. This could involve a requirement for a very broad ranging documentary review and, for some businesses, could generate requirements to register very large numbers of existing trusts and other arrangements. They will need to consider what other types of arrangements have a structure or function similar to trusts and take account of these in their review. They will also need to consider the impact on clients of the new requirements where they are required to disclose sensitive or personal information identifying clients that might be accessed by third parties.

In addition, businesses will need to build appropriate systems to comply with the obligations for all new trusts or similar arrangements that are created going forward. Non-EU trustees will need to be able to comply with these obligations if they enter into business relationships or acquire real estate in the EU.

To reduce the burden going forward, businesses may consider using other contractual techniques in appropriate cases, such as the use of the UK Contracts (Rights of Third Parties) Act 1999 to give third parties enforceable contractual rights without creating a trust.

Businesses will also wish to engage with the UK and other relevant Member State authorities responsible for implementing AMLD5. It will be important that Member States allow firms the maximum time available to prepare for implementation of the legislation and apply the legislation in as proportionate a way as possible. In particular, Member States should be encouraged to do as much as they can to reduce the burden on businesses with respect to the registration of information on pre-existing trusts or similar arrangements. Member States should make clear that the registration requirements for trusts or other similar arrangements with a fluctuating class of beneficiaries only require registration of a description of the class of beneficiaries rather than requiring the trustee to register (and continuously update) a list of current beneficiaries.

In addition, businesses will be concerned to see that Member States adopt and implement appropriate safeguards to protect the security and confidentiality of sensitive information that is filed on the register. For example,

there should be arrangements to ensure that the registrar verifies that persons seeking access are entitled to do so and allows firms to respond to claims by third parties that they have a legitimate reason for seeking access to information. Businesses will be concerned that the arrangements for interconnecting the registers does not undermine safeguards implemented in a Member State.

These issues will be of particular importance in the UK where the new requirements risk exhausting the capacity of businesses to identify and register all the existing and new trusts created under commercial documentation as well as overwhelming the capacity of the central register to cope with the resulting huge volume of registrations by both businesses and individuals.

CONTACTS

Bruce Kahl
Partner

T +44 20 7006 2419
E [bruce.kahl](mailto:bruce.kahl@cliffordchance.com)
[@cliffordchance.com](mailto:bruce.kahl@cliffordchance.com)

Christopher Bates
Partner

T +44 20 7006 1041
E [chris.bates](mailto:chris.bates@cliffordchance.com)
[@cliffordchance.com](mailto:chris.bates@cliffordchance.com)

Marc Benzler
Partner

T +49 69 7199 3304
E [marc.benzler](mailto:marc.benzler@cliffordchance.com)
[@cliffordchance.com](mailto:marc.benzler@cliffordchance.com)

Caroline Dawson
Senior Associate

T +44 20 7006 4355
E [caroline.dawson](mailto:caroline.dawson@cliffordchance.com)
[@cliffordchance.com](mailto:caroline.dawson@cliffordchance.com)

Kate Gibbons
Partner

T +44 20 7006 2544
E [kate.gibbons](mailto:kate.gibbons@cliffordchance.com)
[@cliffordchance.com](mailto:kate.gibbons@cliffordchance.com)

Frédéric Lacroix
Partner

T +33 1 4405 5241
E [frederick.lacroix](mailto:frederick.lacroix@cliffordchance.com)
[@cliffordchance.com](mailto:frederick.lacroix@cliffordchance.com)

Dan Neidle
Partner

T +44 20 7006 8811
E [dan.neidle](mailto:dan.neidle@cliffordchance.com)
[@cliffordchance.com](mailto:dan.neidle@cliffordchance.com)

Hwee Peng Ngoh
Professional Support
Lawyer

T +44 20 7006 1742
E [hweepeng.ngoh](mailto:hweepeng.ngoh@cliffordchance.com)
[@cliffordchance.com](mailto:hweepeng.ngoh@cliffordchance.com)

Monica Sah
Partner

T +44 20 7006 1103
E [monica.sah](mailto:monica.sah@cliffordchance.com)
[@cliffordchance.com](mailto:monica.sah@cliffordchance.com)

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Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

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