



AMLD5: EXPANSION OF THE UK TRUST REGISTRATION SERVICE – FINAL REGULATIONS PUBLISHED

On 15 July 2020, the UK government published the regulations implementing the expanded trust registration requirement under the EU Fifth Anti-Money Laundering Directive (**AMLD5**). The Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020 (the **2020 Regulations**) are a significant departure from the draft regulations published as part of the technical consultation on implementation and will be well received by those operating in the UK wholesale financial and capital markets. A key feature of the 2020 Regulations is a new suite of exemptions, many of which are aimed at financial and capital markets transactions. In this briefing note, we consider the 2020 Regulations and what they mean for these transactions. This briefing note forms part of a series on the expanded trust registration requirement under AMLD5. We can advise corporate trustees and other businesses on the implications of the 2020 Regulations for their activities.

BACKGROUND

The trust registration requirement was first introduced by the Fourth EU Anti-Money Laundering Directive (**AMLD4**) but was limited to taxable trusts. AMLD5 extends the registration requirement to all express trusts. Given the widespread use of trusts across all aspects of personal and commercial life in the UK, the expanded trust registration requirement under AMLD5 could have presented a significant practical challenge for UK businesses. The UK government's approach has been directed at ensuring implementation of the registration requirement was commensurate with EU jurisdictions, recognising that the ubiquity of trusts in the UK contrasted with their relative rarity in EU jurisdictions. It has also sought a measured approach, exempting trusts which were considered to present a low risk of money laundering (**low AML risk**).

In our [response](#) to the government's technical consultation on implementation, we called for additional exemptions to the registration requirement across a broad range of commercial areas, including financial regulation, custody and client money, recognising that the trusts we identified either presented a low AML risk or were regulated elsewhere, making their registration redundant. We also called for non-UK trusts to be subject to the same exemptions as UK trusts to avoid anomalous results. The 2020 Regulations largely address the concerns we raised in our response to the consultation.

Key issues

- New suite of exemptions, including a "catch-all" exemption for trusts incidental to commercial transactions
- The scope of the proposed exemptions for lending and capital markets transactions has been significantly expanded
- The exemptions now apply equally to UK trusts and non-UK trusts
- Trusts with non-UK trustees no longer required to register if their only link to the UK is through a business relationship
- No grandfathering of the registration requirement but fewer trusts in scope
- First registrations under the new regime required from 22 March 2022

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The 2020 Regulations have been laid in draft form before Parliament for "sifting" under the European Union (Withdrawal) Act 2018. The new provisions on trust registration will come into force 21 days after the 2020 Regulations are formally laid before Parliament but, as we discuss below, the first registrations of trusts under the new regime will not be required until March 2022.

The 2020 Regulations operate to implement the registration requirement by amending the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the **2017 Regulations**). The amendments extend the existing registration requirement for trusts but provide a much broader range of exemptions than envisaged by the consultation draft.

THE REGISTRATION REQUIREMENT

In the 2020 Regulations, the registration requirement now applies to "Type A Trusts", "Type B Trusts" and "Type C Trusts" (in each case, other than taxable trusts, as these are subject to the existing registration regime).

A "Type A Trust" is a UK trust which is an express trust and is not an EEA registered trust or exempt.

A "Type B Trust" is a non-UK trust which is an express trust, has at least one trustee resident in the UK and is not an EEA registered trust or exempt, where the trustees of that trust, in their capacity as such (i) enter into a business relationship with a "relevant person" (i.e., a person that is subject to anti-money laundering obligations under regulation 8 of the 2017 Regulations); or (ii) acquire an interest in land in the UK.

A "Type C Trust" is a non-UK trust which is an express trust and is not exempt, where none of the trustees are resident in the UK and those trustees, in their capacity as such, acquire an interest in land in the UK.

For these purposes, a trust is a UK trust if all the trustees are resident in the UK (or at least one trustee is resident in the UK and the settlor was resident and domiciled in the UK when the trust was set up or the settlor added funds to the trust), regardless of the governing law of the trust.

The trustees of Type A, B and C Trusts must collect specified information on beneficial ownership and register with HM Revenue and Customs' Trust Registration Service.

EXEMPTIONS

The 2020 Regulations contain a new schedule 3A which sets out an expansive list of trusts which are exempted from the registration requirement. This is good news for those operating in the UK wholesale financial and capital markets.

General exemption for trusts incidental to commercial transactions

One of the key exemptions is a general "catch-all" exemption for trusts incidental to transactions entered into for genuine commercial reasons. This exemption will be extremely helpful in a commercial context, serving as a "sweeper" for any trusts which fall within the spirit, but not the precise terms, of other exemptions. In particular, unlike the exemption referred to below for lending, capital markets and structured debt transactions and derivatives and

securities trading, this exemption does not require a party to be a "relevant supervised person".

Lending, capital markets and structured debt transactions and securities and derivatives trading

There is a new separate exemption that should cover most trusts arising out of lending, capital markets or structured debt transactions (e.g., bond trusts, security trusts and turnover trusts) and securities and derivatives trading activities. As we noted in our consultation response, the consultation draft of the regulations included a narrowly framed exemption for credit facilities and bond issuances. The 2020 Regulations replace this with a new exemption for trusts incidental to an activity listed in points 2, 3, 6, 7 or 8 of Annex 1 to the Capital Requirements Directive, provided that one or more participants in the activity is a "relevant supervised person".

The listed activities include lending, financial leasing, guarantees, trading in securities and derivatives and participating in securities issues. These activities are defined in broad terms (e.g., covering different types of lending transaction), reducing the risk of activities being unintentionally omitted. Financial and capital market activities not covered by this exemption may be covered by the general exemption for trusts incidental to commercial transactions.

"Relevant supervised person" is defined in the 2020 Regulations as either (i) a relevant person or (ii) a person who is subject to requirements under their national legislation which are equivalent to those in AMLD4 for an obliged entity and is supervised for compliance with those requirements in a manner equivalent to section 2 of Chapter VI of AMLD4.

Financial markets infrastructure and client money, securities or other assets

There are new exemptions for certain trusts created in connection with the default arrangements or rules of financial markets infrastructures, trusts creating certain beneficial interests in uncertificated securities and trusts created for the purposes of protecting client money, securities or other assets held by an authorised person, a clearing member or participant in financial market infrastructure or a financial market infrastructure. In addition, there is a separate exemption available for trusts created by any relevant supervised person for the purpose of holding client money, securities or other assets where the trust is incidental to its business. These exemptions will be welcomed by those providing custody services and those holding sums or assets in a client account.

Guidance

While the new exemptions are very helpful, there are still likely to be questions about their scope and application to particular cases. For example, there may be concerns as to when transactions are regarded as entered into for "genuine commercial reasons" for the purposes of the commercial transactions exemption, how to determine whether non-UK persons are subject to "equivalent" obligations and supervision so that they can be regarded as "relevant supervised persons" and the exact scope of the exemptions in relation to trusts for client money, securities and other assets. In its response to the technical consultation, the government has stated that it will provide guidance on the exemptions as part of general guidance on the registration process.

Selected exemptions under the 2020 Regulations

Financial markets infrastructure

10.—(1) A trust—

- (a) created under, or for the purpose of, the default arrangements of a designated system or of the default rules of a recognised body, or for the purpose of any action or proceedings taken by or for such a system or body under such arrangements or rules;
- (b) relating to the creation of a beneficial interest in securities belonging to a person whose name and address are maintained on a register of securities (within the meaning of regulation 3(1) of the Uncertificated Securities Regulations 2001; or
- (c) created by or for a segregating entity—
 - (i) for the purpose of protecting sums or assets belonging to the segregating entity's clients; or
 - (ii) for the purpose of complying with a legal obligation to safeguard and segregate sums or assets belonging to the segregating entity's clients or to keep separate client records and accounts.

(2) In this paragraph—

“clearing member” and “default rules” have the meanings given, respectively, in sections 190(1) and 188 of the Companies Act 1989;

“default arrangements”, “designated system” and “participant” have the meanings given in regulation 2(1) of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999;

“recognised body” and “recognised central counterparty” have the meanings given in section 313 of FSMA;

“segregating entity” means—

- (a) an authorised person;
- (b) a clearing member of a recognised central counterparty;
- (c) a participant in a designated system;
- (d) a designated system; or
- (e) a recognised body.

Client money etc.

12. A trust created by a relevant supervised person for the purpose of holding client money, securities or other assets, where that trust is incidental to the carrying on of business by the relevant supervised person.

Capital markets etc.

13. A trust created for the purpose of enabling or facilitating an activity listed in points 2, 3, 6, 7 or 8 of Annex 1 to the capital requirements directive as set out in Schedule 2, or for protecting or enforcing rights relating to that activity, where—

- (a) one or more of the participants in that activity is a relevant supervised person, and
- (b) the use of the trust is incidental to the principal purpose of that activity.

Commercial transactions

14. A trust created for the purpose of—

- (a) enabling or facilitating a transaction effected for genuine commercial reasons; or
- (b) protecting or enforcing rights relating to such a transaction, where the use of the trust is incidental to the principal purpose of the transaction

NON-UK TRUSTS

A particular concern with the consultation draft of the regulations was that the proposed exemptions did not apply to non-UK trusts that might be required to register under the regulations. The exemptions in the 2020 Regulations apply equally to both UK trusts and non-UK trusts.

The 2020 Regulations also require a narrower subset of non-UK trusts to register than proposed in the consultation draft of the regulations. The 2020 Regulations divide non-UK trusts into Type B Trusts and Type C Trusts. For Type B Trusts (those with at least one UK resident trustee), the test remains the same as in the draft regulations: they are required to register if they (i) enter into a business relationship with a relevant person (as defined in the 2017 Regulations) or (ii) acquire an interest in UK land. However, Type C Trusts (those with no UK trustees) are only required to register if they acquire an interest in UK land. Accordingly, trusts without UK trustees will no longer be required to register if their only link to the UK is through a business relationship. These changes should be helpful in assuaging concerns around level-playing field issues and forum shopping for those transactions that do not benefit from the new exemptions.

OBLIGATION TO MAINTAIN WRITTEN RECORDS OF BENEFICIARIES

The 2020 Regulations do not address an anomaly presented by Regulation 44 of the 2017 Regulations, which we raised in our consultation response. Regulation 44 requires trustees of "relevant trusts" to maintain written records of the beneficial owners of the trust and provide them on request to any law enforcement body. "Relevant trust" is defined in the 2017 Regulations as a UK express trust, a non-UK taxable trust or (per the 2020 Regulations) a non-UK trust which is subject to the registration requirement.

Therefore, a UK trust could be exempt from the registration requirement, but the trustees could still be required to keep written records of the beneficiaries of the trust under Regulation 44. If a UK trust is exempt from the registration requirement (because it is low AML risk or regulated elsewhere), there would seem to be limited value in requiring it to keep written records of beneficiaries. The requirement also creates an arbitrary distinction between exempt non-UK trusts (which are not subject to Regulation 44) and exempt UK trusts (which are subject to Regulation 44).

The requirement would cause most concern to trustees of trusts for a class of changing beneficiaries, where the trustees could find it challenging to comply with this requirement (e.g., security trusts for bond issues or syndicated loans). However, Sector 17 of the [Joint Money Laundering Steering Group guidance](#) (which relates specifically to syndicated lending and has been approved by government) is helpful. It provides that security trustees only need to maintain a description of the class of beneficiaries under the trust to meet the Regulation 44 requirement: in the context of a syndicated loan, this would be the "Secured Finance Parties, from time to time".

REGISTRATION DEADLINE, GRANDFATHERING AND DILIGENCE

The 2020 Regulations provide that the deadline for registration is 10 March 2022 for trusts set up before 9 February 2022. Registrable trusts set up on or after 9 February 2022 must be registered within 30 days of being set up. Once a trust is registered, trustees will have 30 days from when they are aware of any changes to update the details on the register. In its response to the technical consultation, the government indicated that it considers the 30-day deadline for new registrations and updating the register to be sufficient and in line with reporting deadlines imposed on companies for reporting details of "People with Significant Control" to Companies House. The upgraded register should become available during 2021.

In our consultation response, we called for grandfathering of existing trusts under the registration requirement given the very large number of existing trusts that would have been subject to the registration requirement as envisaged by the consultation draft of the regulations and the considerable due diligence required to identify and register these trusts within the originally proposed timeframe. There is no grandfathering in the 2020 Regulations. However, the exemptions in the 2020 Regulations will mitigate the impact on financial and capital markets transactions. The exemptions will enable market participants to streamline their due diligence process because they can exclude a number of broad categories of trust from the scope of their review. In addition, the government has now provided corporate trustees and other businesses with, in effect, 18 months to prepare for the implementation of the new registration requirements.

Nevertheless, corporate trustees and other businesses will still need to carry out a review to determine whether they may be trustees of registrable trusts. In many cases, the exemptions will enable them to conclude that the registration requirements do not apply to some and perhaps all of the trusts which may arise in the course of their business. However, trustees or other businesses may identify some types of trust which fall outside the scope of the exemptions and within the scope of the registration requirements.

Where the registration requirements may apply, trustees and other businesses will need to consider whether they have the relevant information to comply with the registration requirements and whether their documentation gives them rights to require this to be provided to them (and how the obligation to disclose information via registration interacts with any confidentiality obligations to which they are subject).

Trustees and other businesses potentially subject to the 2020 Regulations will also need to develop robust processes for the ongoing identification of registrable trusts, data collection in respect of beneficiaries, record keeping and registration with the Trust Registration Service.

In addition, from 10 March 2022, all firms subject to anti-money laundering obligations under the 2017 Regulations entering into a business relationship with a trust which is subject to the new registration requirements must check whether the trust has been properly registered and must investigate and report any discrepancies. Therefore, even when they do not act as trustee, these firms may need to determine whether the trusts used on their transactions are subject to the new requirements and will need to put in place new processes to comply with this requirement.

PENALTY REGIME AND AWARENESS RAISING

The amended 2017 Regulations will give the UK authorities a range of enforcement powers in relation to contraventions of the registration and record-keeping requirements, including powers to impose administrative penalties and to prosecute a contravention as a criminal offence.

However, in its response to the technical consultation, the government confirmed that it intends to proceed with the proposed penalty regime outlined in the technical consultation. That had envisaged that the Trust Registration Service would take a proportionate response to failures to register trusts, generally only imposing fixed administrative penalties for contraventions and then only after sending initial reminders to trustees that fail to comply. However, the government is considering a more stringent penalty regime where trustees' failure to meet the requirements is due to deliberate behaviour. Further details of the penalty regime will be provided in guidance in due course.

In its response to the technical consultation, the government also stated that it is considering how best to raise awareness of the registration requirement and the obligations on trustees to register trusts and keep information up to date.

WHAT'S NEXT?

Those operating in the UK wholesale financial and capital markets will welcome the new exemptions, the narrowing of the scope of the registration requirements for non-UK trusts and the March 2022 timetable for first registrations under the new regime. This should give them time to determine the extent to which the new registration requirements will apply to them, to carry out a review of their existing business and to prepare for compliance with the new regime in the light of the expected guidance from the government.

For advice on the 2020 Regulations and the new registration requirements, please get in touch with your usual Clifford Chance contact or any of the individuals listed in this briefing.

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