



## AMLD5: EXPANSION OF THE UK TRUST REGISTRATION SERVICE – FINAL REGULATIONS PUBLISHED – REAL ESTATE IMPLICATIONS

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 commercial real estate market. A key feature of the 2020 Regulations is an expanded suite of exemptions, many of which are aimed at commercial transactions. In this briefing note, we consider the 2020 Regulations and what they mean for real estate transactions. This briefing note forms part of a series on the expanded trust registration requirement under AMLD5.

### 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 being manipulated for money laundering and terrorist financing purposes (**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 real estate, corporate and financial and capital markets. The trusts we identified for exemptions 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

#### Key issues

- Expanded suite of exemptions, including a "catch-all" exemption for trusts incidental to commercial transactions and a registration gap exemption
- The exemptions now apply equally to UK trusts and non-UK trusts
- No grandfathering of the registration requirement but fewer trusts in scope
- First registrations under the new regime required from 22 March 2022

#### AMLD5 Briefing Note Series

- [AMLD5 – expanded trust registration requirement – unexpected consequences for UK business](#)
- [AMLD5 – expanded trust registration requirement – delayed but in the pipeline for the UK](#)
- [AMLD5 – expansion of the UK trust registration service](#)
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Regulations largely address the concerns we raised in our response to the consultation.

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; and
- trustees acquire an interest in land in the UK where at least one of the trustees becomes the registered proprietor of freehold land or a lease with a term of more than 7 years.

The trustees of these 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 and means that most of the trusts commonly encountered in the transactional aspects real estate dealings should now fall within one of

the exemptions. However, holding structures which include express trusts will likely fall outside the exemptions and require registration.

#### *Registration gap exemption*

One of the key exemptions from a real estate perspective is the new exemption for the registration of assets. This provides an exemption for the registration gap trusts which arise between completion of the purchase of UK land (when the beneficial interest passes to the purchaser) and completion of the registration of that purchase at HM Land Registry (when legal title vests in the purchaser).

#### *General exemption for trusts incidental to commercial transactions*

Another key exemption 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 many of the trusts commonly used to facilitate commercial transactions and to protect or enforce rights arising from them. This exemption should cover most of the trusts commonly utilised in the transactional aspects of commercial real estate transactions. For example:

- landlords holding rent deposit or service charge monies on trust for tenants (residential service charges required by statute to be held on trust have a specific exemption)
- trusts incidental to purchase of a property such as rent which is incorrectly paid by tenants to sellers post completion being held on trust for buyers pending transfer to them and rent deposits held on trust by sellers pending tenant consent to transfer deposits to buyers and insurance premium refunds passed by sellers to buyers on trust for tenants who contributed to the premiums
- insurance provisions under certain lease types which provide that where reinstatement is frustrated the proceeds are held on trust by the loss payee pending distribution to parties with an interest in the building

#### *Property holding structures*

Not all trusts encountered in the UK real estate market will be able to benefit from the general commercial transactions exemption. Property holding structures often utilise express trusts (for example nominee companies holding UK land on trust for an entity which does not have separate legal personality to enable it to own the land itself). The policy behind the exemptions is to take low AML risk trusts outside of the registration requirement. Given the perception of land ownership as a high risk area for manipulation for money laundering and terrorist financing purposes and the general move towards greater transparency over the ownership of UK land, it is likely that this exemption is not intended to cover express trusts used to acquire UK land. Such trusts will likely fall outside the exemptions as not being incidental to the principal purpose of the transaction and require registration.

For example, if a property investor establishes a limited partnership to acquire and hold a property as an investment, the limited partnership cannot itself hold the legal title to that land. The general partner(s) and/or nominee companies will hold the legal title on trust for the partners. Such a trust is unlikely to be incidental to the principal purpose of acquiring and holding the property as an investment. Contrast this with a non-property investment business which

### **Selected exemptions under the 2020 Regulations**

#### *Registration of assets*

A trust created on the transfer or disposal of an asset where the purpose of the trust is to hold the legal title to the asset on trust for the person to whom the transfer or disposal is being made until the time when the procedure required by law to effect the transfer or disposal of legal title is completed.

#### *Commercial transactions*

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

#### *Co-ownership*

A trust of jointly held property where the trustees and the beneficiaries are the same persons.

#### *Trusts meeting legislative requirements*

A trust holding tenants' contributions for the purposes of section 42 of the Landlord and Tenant Act 1987.

happens to be structured as partnership and acquires a property as its business premises. In this situation, the creation of the trust may be considered to be incidental to the principal purpose of acquiring business premises.

#### *Co-ownership exemption*

Anyone who co-owns a property with a friend or family member will also be relieved to see the new co-ownership exemption. This ensures that where the trustees and beneficiaries are the same there is no requirement to register which will be welcome news to the residential conveyancing market.

#### *Guidance*

While the new exemptions are very helpful, there may still be questions about their scope and application to particular cases. For example, whether a particular transaction will be regarded as "incidental to" the principal purpose of a transaction or entered into for "genuine commercial reasons" for the purposes of the commercial transactions exemption. 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.

## **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.

By splitting the original Type B Trusts concept into Type B Trusts and Type C Trusts (as described above), the 2020 Regulations also require a narrower subset of non-UK trusts to register. However, for real estate transactions the distinction between Type B Trusts and Type C Trusts has less significance. Any non-UK express trust acquiring an interest in land in the UK will need to register unless exempt.

## **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 express 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). It is hoped that this anomaly will be addressed in the guidance.

## **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 proposed timeframe. There is no grandfathering in the 2020 Regulations. 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, corporate trustees and other businesses have, 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 (for example those holding UK land in trust) 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).

In addition, trustees and other businesses potentially subject to the 2020 Regulations will 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.

## **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 real estate market will welcome the new commercial transaction and registering assets exemptions and the March 2022 timetable for first registrations under the new regime. This gives 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. Commercial trustees and businesses using trusts in their property holding structures would be advised to commence this process now and use the time wisely.

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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