

AMLD5: EXPANDED TRUST REGISTRATION REQUIREMENT – UNEXPECTED CONSEQUENCES FOR UK BUSINESS

EU Member States are required to implement the Fifth EU Anti-Money Laundering Directive (AMLD5) by **10 January 2020**. A key feature of AMLD5 is the requirement for **all** express trusts and their beneficial owners to be registered in a central national register, a radical departure from the current trust registration requirement which is limited to taxable trusts. This has far reaching consequences for both businesses and individuals in the UK as trusts are an intrinsic part of English law. As 10 January draws ever closer, the UK has yet to publish its implementation legislation so exactly what is required remains to be seen. In this briefing, we consider what can be done now in anticipation of the unknown to come.

BACKGROUND

The trust registration requirement was first introduced by the Fourth EU Anti-Money Laundering Directive (AMLD4), however, under AMLD4, it was limited to trusts that generated tax consequences. AMLD5's extension of the requirement to all trusts is therefore significant and has been estimated by the UK Association of Taxation Technicians as potentially extending the number of registered trusts in the UK from around 200,000 to as many as two million. Trusts, as a creature of English law, are ubiquitous in both personal and business life. This contrasts with other EU Member States where many arrangements which would be categorised as trusts under English law are contractual. Please see our [previous briefing note](#) for further background on the trust registration requirement under AMLD4 and AMLD5.

UK IMPLEMENTATION

AMLD5 clearly presents a material compliance challenge for the UK. In April 2019, HM Treasury launched a [consultation](#) on the transposition of AMLD5 into UK law. The government has not yet published a response to the consultation so the UK's approach to certain key aspects of the registration

Key issues

- AMLD5 requires all express trusts, regardless of when they were created, and their beneficial owners to be registered in a central national register
- Trusts are ubiquitous in English law compared to other EU Member States
- Many common legal structures not traditionally considered as trusts may potentially be caught e.g. structures used to hold real estate
- EU Member States must implement AMLD5 by 10 January 2020
- UK implementation legislation is awaited following a spring consultation
- Practical steps can be taken now in advance of implementation

requirement affecting businesses has yet to be articulated. In our consultation response, we noted some ways to ameliorate the requirement.

First, the express trusts captured by the registration requirement should be clearly identified as a practical matter to aid compliance and for legal certainty. The term "trust" may not always be expressly used in documents and there are common legal structures which are trusts but are not traditionally considered as such (e.g. certain legal structures used to hold real estate). It is also pertinent because non-EU resident trusts that (i) acquire UK land or property or (ii) enter into a new business relationship with a regulated individual or business will be captured. The trusts subject to the registration requirement should also be limited to ensure a consistent approach with other EU Member States.

Second, again for practical purposes, where the beneficiaries of a trust are a regularly changing class (e.g. lenders in a syndicated, secured financing or bondholders), only the class and not the individuals should be identified. This reflects the difficulties inherent in the registration requirement where the beneficiaries regularly change (e.g. in the case of a highly liquid secured loan, the beneficiaries could change several times on an intra-day basis), leading to a significant administrative burden.

Third, in relation to penalties, the government noted in the consultation paper that tax-based penalties for non-compliance may no longer be appropriate as the trust registration requirement is not based on taxable activity. We suggested in our response that the penalty regime should avoid criminalisation and disproportionate fines, given the broad scope of the registration requirement, the practical challenges it presents and the dangers of inadvertent breach by businesses and individuals alike.

As noted, the government has not yet published its response to the consultation or implementing legislation. The government also indicated in the consultation paper that a technical consultation would be run later in 2019 which is also awaited. Whether the implementing legislation will address the practical challenges remains to be seen. EU law requires the UK to implement AMLD5 fully and on time, as the UK will still be an EU Member State on 10 January 2020. Even if the UK leaves the EU on 31 January 2020 on the basis of the currently proposed withdrawal agreement, this requirement will continue throughout the transition period under the withdrawal agreement (to the end of 2020 or possibly up to the end of 2022), which will restrict the government's flexibility in implementation. However, the government notes in the consultation paper the need for proportionality given the low risk of money laundering and terrorist financing presented by UK trusts. It also notes the need to ensure consistent application of AMLD5 across the EU Member States. Hopefully these will serve as guiding principles to frame the implementing legislation and facilitate a pared back registration requirement (e.g. with express trust narrowly defined and an appropriate penalty regime). Nevertheless, while the devil is ultimately in the detail of the implementing legislation, it is not too early for corporate trustees and businesses to take steps.

PRACTICAL STEPS

Under AMLD5, there is no "grandfathering" arrangement for existing trusts, so the registration requirement will apply to existing trusts. In the consultation paper, the government has proposed a deadline of 31 March 2021 for existing trusts to be registered and, for trusts created on or after 1 April 2020, a deadline of 30 days from creation to be registered. If the government holds to

this, action now is recommended notwithstanding the absence of the implementing legislation.

Corporate trustees and businesses should therefore consider taking the following steps:

- **diligence** – for any trustees and businesses already complying with AMLD4, processes may already be in place to identify taxable trusts in their documents – these should be extended to include all trusts. Otherwise, trustees and businesses should begin to develop processes to identify existing trusts. Word search tools and AI technology may assist with this exercise;
- **disclosure** – trustees and businesses should check whether their documents contain provisions enabling them to request any information required to comply with AMLD5 and consenting to disclosure of the relevant information to the Trust Registration Service (the UK's central national register); and
- **process** – for ensuring compliance with AMLD5 going forward, trustees and businesses should establish robust processes around (i) identification of trusts; (ii) data collection in respect of beneficiaries; (iii) record keeping and (iv) registration with the Trust Registration Service.

NEXT STEPS

Clifford Chance will continue to monitor developments in this area and can advise on the implications for your business. Please get in touch with your usual Clifford Chance contact or any individuals listed in this briefing for specific advice.

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