

Consultation Response: Transposition of the Fifth Money Laundering Directive

TACT

By way of background TACT - The Association of Corporate Trustees is the membership organisation of the UK corporate trustee sector. Its members include trust companies owned by banks and major financial institutions, as well as those set up by firms of accountants, lawyers and pensions professionals.

There is a general concern that the registration requirements that will be imposed by 5AMLD will overload the national trust register with a significant number of small irrelevant trusts.

The registration of the considerable number of trusts currently not subject to taxation in the UK will place a significant and immediate administrative burden on practitioners with the potential of taking the focus away from the purpose of AML risks. With the scope of registration now being so wide it will have an impact on individuals who will attempt to register trust structures but will not understand all of the requirements to do so correctly. Therefore, the government software and process for the registration of trusts needs to be as simple as possible to reduce unnecessary administration and make registration easy for the general public without impacting on the minimum statutory requirements.

There is already evidence that UK trusts are considered to be a low AML risk.

It is considered that there will be millions of UK trusts that will now require registration. Most organisations who deal with the creation or administration of trusts will comply with the new registration requirement. However, where pre-5AMLD dormant trusts come to light years later and a practitioner/adviser discovers that their client has not registered their trust it is hoped that the penalties for not registering will not be disproportionate.

We now deal with particular questions raised in the consultation document:

Questions 1-43:

No comment.

Questions 44,45,46:

It is felt that guidance needs to be clear as to what constitutes "secure electronic identification" for the purposes of customer due diligence. Electronic identification from a recognised source is an important means of identifying clients which can result in administrative savings for most companies. We would therefore encourage the use of electronic means of identification wherever possible. Government recognition and formal approval of acceptable sources of electronic identification systems would provide practitioners with reassurance and encourage the use of electronic identification across the industry.

Questions 47-63:

No comment

Question 64:

The examples of the categories of UK trusts that are likely to fall within the definition of an express trust in paragraph 9.12 (page 48 of the consultation document) focus mainly on those for the individual. We appreciate that the government does not expect to specify a full list of types of express trust within the legislation but for the purpose of assisting the government with identifying those trusts used in the corporate sector we have listed examples in the appendix attached to this document. With reference to paragraph 9.14 we advocate for a clear exclusion of bond and security trusts from the definition of an express trust as they are essentially just contractual arrangements.

Question 65-69:

No comment

Question 70:

The introduction of the new registration requirements will inevitably incur additional costs for clients having to pay agents to deal with the registration on their behalf. Many trusts now having to register will be dormant and have no liquid assets with which to meet these costs. Trustees will have to consider how the cost of additional compliance burden can be met. In cases where the Settlor is deceased, and there are no defined beneficiaries that can easily be identified to meet this cost, the trustees may have to meet these costs themselves. Such issues will inevitably make a change of trustees more difficult and trustees may be more reluctant to take on the role of trustee where trusts are dormant for this reason.

Question 71:

Whilst the requirement for additional information to confirm the legal identity of an individual, such as national insurance numbers and passport numbers, is understood there will inevitably be cases where these do not exist. Individuals who have never worked or held passport (often minor or elderly beneficiaries) will not be able to provide this information. Consequently, the new registration system needs to take this into account and guidance given to trustees on what alternatives would be permitted. The system would also need to account for those beneficiaries which are not specified in the declaration of trust (such as the Share Trustee structure for Asset-Backed International Bond/Medium Term Note Programme/Commercial Paper Programme (including securitisations, repackagings and DOs) transactions – see appendix).

Question 72:

It is suggested that the introduction of the new registration deadline of 31 March 2021 gives a long lead time to register the greater number of trusts. It should not be underestimated that the task of registering every express trust will be huge, take an extraordinary number of man hours to achieve and incur considerable administrative cost. Nevertheless, it is appreciated that deadlines have to be set but we would ask the government to ensure that the software being used to register the trusts is fully tested and that a pilot programme is introduced for real users to enable the final software to be fit for purpose, complete and available on 1 April 2020 with full guidance. The late introduction of the TRS caused considerable inconvenience and cost to trustees wishing to register trusts. Our members complained of extreme

pressure to meet short deadlines because the system was not ready, was continuously changed during the process, fields could not be completed, and guidance was amended.

It should also be noted, that in the case of some capital market transactions, the Trustee is not in control of the transfer of the underlying instrument and as such the timing and the feasibility itself to obtain the relevant information should be considered (i.e. a Trustee could not include in the documentation a limitation to the ability to transfer the notes subject to the completion of the KYC requirements).

Question 73

It is suggested that new trusts be registered within 30 days of creation and that amendments to the existing register should be made within 30 days of becoming aware of the change. Again, such a deadline will rely on a fool-proof registration system. It should also be noted that the creation of charitable trusts require registration with the charity commission and such registration often takes longer than 30 days to complete. Consequently, whilst the trust has been created and could be registered at the same time as applying for charitable status from the charity commission, if the trust registration requires the trustees to report the registered charity number at the time of registration it would be difficult to do this within the 30 day deadline.

Question 74

We have always taken the view that the AML registration requirement for trusts should never have been tax related and that the introduction of tax-based penalties for non-compliance was wrong. Now that this has been accepted, we welcome a bespoke penalty regime. Whilst we have no views on precisely what the new penalty regime should look like we consider that this should be fair and proportionate. Unless the government completely succeeds in educating and informing the general public of the requirement to register trusts there will inevitably be historic dormant family trusts which are not registered until an event occurs requiring professional advice. In such circumstances, the lay trustee should not be burdened with extreme penalties where such a trust had previously remained unregistered, particularly where there was no deliberate intention not to comply.

Question 75-106

No comment.

Appendix

CAPITAL MARKETS TRANSACTIONS

Transaction	Role of Trustee
Unsecured International Bond/Medium Term Note Programme	Note Trustee <ul style="list-style-type: none">• holds the benefit of the payment obligation and other covenants on behalf of noteholders in parallel with the issuer's payment obligation to the noteholders• responsible for passive monitoring of compliance with issuer's obligations• has discretion to exercise powers on behalf of noteholders, including declaration of event of default, acceleration of notes, enforcement of noteholders' rights of recovery, agreeing waivers and amendments that are not prejudicial to noteholders, convening noteholder meetings and the substitution of obligors• acts in accordance with instructions of noteholders• noteholders may only enforce the note individually after trustee fails to do so
Sovereign Bonds	Trustee <ul style="list-style-type: none">• as above• encourages use of collective action provisions (as recommended by the IMF)
Secured International Bond/Medium Term Note Programme	Note Trustee <ul style="list-style-type: none">• as above Security Trustee <ul style="list-style-type: none">• holds the benefit of security for the noteholders• enforces security following default and distributes proceeds to noteholders• acts in accordance with instructions of noteholders
Asset-Backed International Bond/Medium Term Note Programme/Commercial Paper Programme (including securitisations, repackagings and CDOs)	Note Trustee <ul style="list-style-type: none">• as above Security Trustee <ul style="list-style-type: none">• as above and in addition, may hold the security not only for noteholders but also for other secured parties, such as derivative counterparty, credit enhancement provider or liquidity provider• enforces security following default and distributes proceeds in accordance with priority of payments

Share Trustee

- holds the shares of the issuer-SPV on trust for secured creditors of the issuer-SPV
- may be required to transfer the shares to beneficiaries or another trustee on occurrence of an enforcement event

Collateral Trustee

- holds the benefit of security granted by an SPV on trust for secured creditors of the SPV (possibly through other collateral trustees or the security trustee)
- enforces security on behalf of secured creditors and distributes security in accordance with priority of payments
- acts in accordance with instructions of secured creditors

Receivables Trustee/Master Trust Trustee

- underlying assets are transferred to the receivables trustee or master trust trustee for the benefit of the originator and the issuer-SPV (for the master trust, one of a number of SPVs covering different transactions), in varying proportions as the transaction progresses

Collective Investment Scheme (also known as Unit Trust)

Trustee

- holds assets of the collective investment scheme for the benefit of investors, who have undivided participation of investment in the scheme
- assets of the trust are invested by a manager in accordance with the trust deed
- follows the instructions of the manager, e.g. with regard to voting of securities held by the trust
- has a duty to take reasonable care to ensure that the manager calculates issue and redemption prices correctly

Debenture Stock

Stockholder Trustee

- holds security on behalf of the stockholders
- holds the benefit of payment obligations and other issuer covenants on behalf of stockholders
- takes day-to-day decisions on behalf of stockholders in limited circumstances
- enforces security following default and distributes proceeds to stockholders
- acts in accordance with instructions of secured creditors

Mortgage Debenture Stock

Stockholder Trustee

- as above, where the security includes mortgages
- holds title deeds to unregistered mortgaged property
- handles any releases and substitutions of property, based on valuation, title and security issues

- acts in accordance with instructions of secured creditors
- to hold shares in the Issuer-SPV on discretionary trust for an unnamed charity. The charity will be determined upon unwind of the Issuer-SPV (and therefore the trust); any shareholder funds remaining in the Issuer-SPV at that time would be paid to the charity.

Participation Certificate

Participation Trustee

- holds trust property on behalf of beneficiaries and distributes it in accordance with the terms of issue

International Equity

Depository Trustee

- holds underlying equity shares on trust for the investors
- issues certificates (known as “global depository receipts”) to the investors, which are traded in the financial markets
- passes through dividends to the investors and exercises voting rights on the underlying equity shares in accordance with investors’ directions

High Yield bonds (trust documentation often contains additional covenants)

Trustee

- generally, takes a more active role than with investment grade bonds, due to the increased risk of default

TRUSTEE ROLES WITHIN MARKET INFRASTRUCTURE

Transaction

Role of Trustee

CREST - Crest Depository Interests

- holds international securities under a Global Deed Poll for the benefit of holders in CREST of CDIs

CREST – cross-border securities settlement

- CREST (or another CSD) holds securities subject to transfer for benefit of seller and buyer during settlement process, to protect integrity of cross-border transactions.

BANK MARKETS TRANSACTIONS

Transaction

Role of Trustee

Secured syndicated loans

Security trustee

- holds security over the assets of the debtor on behalf of the creditors
- permits new syndicate members to participate in the lending and security without the need to re-charge the security

Project Finance

Security Trustee

- holds security over a wide range of assets for the benefit of all the lenders, whose interests may vary
- enforces covenants on behalf of the lenders

Trustee

- holds bank accounts into which project cashflows will be paid prior to their distribution
- holds the benefit of covenants designed to protect the integrity of the security
- responsible for monitoring the borrower's compliance with covenants
- invests and directs cashflows as required by the parties and the project documentation

Private Finance Initiative

Trustee

- is assignee of agreements which allow lenders time to arrange substitute providers of finance in the event of failure of particular aspects of financing arrangements

OTHER EXAMPLES OF COMMERCIAL TRUSTS

Transaction

Role of Trustee

Dual listed corporate structures

Trustee

- holds special voting shares in both companies through SPVs
- votes on joint electoral resolutions, thus ensuring that votes cast by both shareholders count in determining whether resolutions are passed
- holds the benefit of warranties

Joint Ventures

Trustee

- holds shares or voting rights in the company, thus providing greater protection for minority shareholders
- acts as a controlling director of the company in cases where competition law or banking regulation may prohibit others from holding control

Intercreditor agreements

Trustee

- a subordinated lender holds sums received via a subordination agreement on insolvency on trust for senior lenders

- ensures that the position of the senior lender is protected, and not defeated by insolvency legislation

Custody arrangements**Custodian**

- places, maintains and safeguards the trust assets

Special voting shares**Trustee**

- holds and exercises rights of shareholders through a special voting company ensuring equality of benefits for shareholders

Holdings of golden/special shares**Trustee**

- holds and exercises rights of the shareholder in order to stream the benefits from its rights to different beneficiaries
- can exercise negative control, as consent is required before specific changes are made to the ownership or structure of the company

Escrow Arrangements**Security Trustee**

- holds shares (in the seller) to the order of the purchaser against satisfaction of warranty claims

National and Euro Lottery**Security Trustee**

- holds funds on behalf of lottery winner