

Fifth Money Laundering Directive and Trust Registration Service



To: Asres.consult@hmrc.gov.uk
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Introduction

1. The British Property Federation (BPF) represents the real estate sector – an industry which contributed more than £100bn to the economy in 2018 and supported more than 2 million jobs.
2. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.
3. We are supportive of the government's efforts to tackle money laundering and terrorist financing. However, we are concerned that the broad scope of the current rules could bring in large swathes of common commercial arrangements within the real estate sector which could impose a disproportionate administrative burden on very low risk arrangements. We set out further details within the appendix – and would propose some changes to ensure that the rules are as well targeted as possible to the high-risk arrangements that the government is intending to capture.
4. We would also like to draw your attention to three further important points below:
 - 4.1. Almost a third of UK commercial real estate is owned by overseas investors and a further third are owned by collective investment vehicles, which cater to a global investor base. Given the international nature of the commercial real estate sector, we are keen to ensure that the registration requirements for both UK and overseas trusts are as consistent as possible, to ensure that the rules do not inadvertently create an unlevel playing field for different types of investors.
 - 4.2. There is currently some conflicting analysis as to whether non-compliance of these rules would result in criminal or civil sanctions. We consider that a criminal sanction would be draconian in these circumstances, particularly given the broad nature of long standing and low risk arrangements that could potentially fall within scope. At the very least, there should be no ambiguity around the exact nature of the sanctions associated with non-compliance; and consideration should be given to grandfathering for exiting arrangements.
 - 4.3. It is a unique feature of English law that many legal arrangements take the form of trusts. In other jurisdictions, the equivalent legal arrangements would often be contractual. It is important for the UK to be mindful of the comparable structures that will fall within scope in other member states to ensure the UK remains competitive and equivalent.
5. We would be pleased to respond to any queries – and would also be happy to arrange a meeting to discuss any aspect of our response in more detail – do let us know if that would be helpful.

Yours sincerely,

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Fifth Money Laundering Directive and Trust Registration Service



Appendix: Common trusts in the real estate sector

6. Our appendix sets out some of the common trusts which typically occur in the real estate sector, and why some exemption or guidance would be helpful in certain circumstances. To that end, our response is focussed on the first three questions posed in the consultation.

Question 1 – Are there any express trusts that should be out of scope? Please provide examples and any evidence of why they meet the criteria of being low risk for money laundering and terrorist financing purposes or supervised elsewhere.

7. Trusts which arise within real estate can be categorised in three main ways: as a result of the mechanics of real estate law; as a temporary or incidental arrangement; and as part of the property ownership structure. We go through each in turn to set out the commercial scenarios when these might arise, to help give an indication of the potential scale of reporting of many commercial and low risk arrangements, unless further exemptions are introduced.

A. Mechanics of real estate law

a. Registration Gap

For every transfer of real estate and most leases and mortgages; an asset will be held on trust until the ownership details of the property have been updated on Land Registry. It would be disproportionate to include these trusts within scope, which are simply a mechanical part of dealing in real estate – and are typically short term in nature.

b. Lease related trusts (such as rent deposits and service charges).

A large majority of rent deposits and service charge monies are held on trust on behalf of the tenants. The purpose of the trust arrangement is to protect tenants' money from being misappropriated by the landlord and to ring fence it in the event of insolvency of the landlord.

c. Family/friends buying home together

The consultation identifies (and we agree) that joint ownership of a home by friends or family members is a trust which trustees should not be required to register. However, there is no specific exemption in the proposed legislation for this type of trust, so there is an element of doubt as to whether the legislation achieves this outcome.

d. Client Accounts

Monies can be held on trust in client accounts in various situations, including:

- i. Property managers/estate agents holding rent collected from tenants in their client accounts for the benefit of their landlord clients (and in practice the property managers would often hold the rent deposits).
- ii. Solicitors holding completion monies in advance of the purchase of a property.

B. Temporary or incidental trusts

Trusts can arise which are Incidental to the main purpose of transaction, for example:

- a. Following the sale of a property, tenants may accidentally continue to make rent payments to the previous landlord. The rent received by the seller after the ownership of a property has transferred is commonly held on trust for the purchaser. Similarly, the purchaser (new landlord) will collect or pursue any arrears due and hold this on trust for the seller (previous landlord).

- b. Insurance premium refunds held for tenants on trust, before being repatriated.

C. Real Estate ownership structures

Property holding vehicles involving trusts are very popular way to hold property in the UK. These typically facilitate joint venture partners to club their resources together and allow the JV assets to be held on trust for the JV parties. Another benefit of some of the tax transparent trust structures which have grown in popularity in the UK real estate sector is that they allow non-taxable investors, like pension funds or sovereign wealth funds, to invest alongside other investors, whilst still maintaining their individual tax status. Common holding structures include: Jersey property unit Trusts (JPUTs), Guernsey Property Unit Trusts (GPUTs), Limited Partnerships, and Property Authorised Investment Funds (PAIFs).

Question 2 – Do the proposed definitions and descriptions give enough clarity on those trusts not required to register? What additional areas would you expect to see covered in guidance?

- 8. We would suggest that significant additional exemptions and carve outs are required in order to avoid disproportionate reporting obligations on purely commercial arrangements – and to better target the rules at higher risk structures.
- 9. To that end, we would suggest that additional carve outs are required for the following:
 - 9.1. **Trusts which arise as a result of the mechanics of operating real estate law:** Exemptions should be introduced where trusts exist simply by virtue of the established legal or mechanical process which exist when transacting in land, such as those listed in section A above. Without such an exemption, the rules would be disproportionate, and not well targeted – with a risk that almost every purchase, lease or mortgage over land or property could be within scope.
 - 9.2. **Trusts which are incidental to the main transaction:** By their very nature, trusts which are incidental to a wider arrangement are likely to be immaterial relative to the main transaction, and therefore are likely to be a low risk. As such, exemptions should be introduced where a trust is incidental to a wider transaction, such as those listed in section B.
 - 9.3. **Trust which are temporary in nature:** An exemption based on the time that the trust is in existence for could be another option to classify some of the trusts identified in sections A and B. For example, the Registration Gap, the client accounts, and the incidental trusts will, in many cases, not be in existence for more than 30 days.
 - 9.4. **Real estate ownership structures**
 - 9.4.1. **Existing structures:** Where a trust exists or arises as a result of an existing arrangement – it would be excessive to impose reporting obligations. Not least because it will be difficult to raise awareness of obligations amongst an unknown pool of the population – and it would be particularly excessive if a lack of awareness of the rules could result in criminal sanctions. At the very least, it would be reasonable to provide for some grandfathering provisions for existing trust arrangements.

Fifth Money Laundering Directive and Trust Registration Service



9.4.2. **Trusts which are already subject to some other kind of regulatory supervision or reporting requirement under another government agency.** Property Authorised investment Funds are already regulated by the FCA, and therefore should be deemed to be low risk. Furthermore, some structures already have existing reporting and disclosure requirements with other government agencies. For example, partnerships are required to disclose trustee details on their annual tax returns (as required under s12AA(10B) TMA 1970). There should be appropriate carve outs where there are existing reporting and transparency requirements with another government agency, in recognition of the lower risk these structures represent - and to avoid requiring taxpayers to report the same information multiple times to different government agencies.

Question 3: do the proposed registration deadlines and penalty regime have any unintended consequences that would lead to unfair outcomes for specific groups?

10. As noted above, many existing real estate ownership structures will have been established some time ago – perhaps several decades ago. Where a trust exists or arises as a result of an existing arrangement – it would be excessive to impose reporting obligations. It will be difficult to raise awareness of new obligations amongst an unknown pool of the population – and furthermore, it would be particularly excessive if a lack of awareness of the rules could result in criminal sanctions. We would therefore suggest providing for some grandfathering provisions for existing trust arrangements.
11. Finally, and as noted in the introduction, it is important that there is clarity around the exact nature of the sanctions associated with these regulations.