

Insights

## GOVERNMENT EXPEDITES LEGISLATION ON A REGISTER OF OVERSEAS ENTITIES THAT OWN UK PROPERTY IN ITS ECONOMIC CRIME (TRANSPARENCY AND ENFORCEMENT) BILL 2022

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### SUMMARY

As part of its response to the Russian invasion of Ukraine, HM Government intends to fast-track the long-awaited [Economic Crime \(Transparency and Enforcement\) Bill](#). The Bill requires overseas entities to register with, and provide details of their beneficial owners to, UK Companies House before the overseas entity can be registered as the legal owner of UK land. Based on the draft Registration of Overseas Entities Bill (published and consulted on in July 2018 and originally intended to go live in 2021) implementation is now expected to proceed at pace once the Bill becomes law.

### SUMMARY OF THE BILL

The Bill sets out civil and criminal penalties for the various offences it introduces, extends the existing regime for unexplained wealth orders (**UWOs**) (to include trustees, partners, directors etc who operate entities holding property in the UK) and establishes a strict civil liability test for sanctions violations. These limbs are in part an attempt to tackle criticisms around effective enforcement, on the basis that civil penalties will be easier to enforce abroad, and against land or other assets in the UK.

Being introduced alongside plans to reform and better resource Companies House and to increase the transparency of UK corporate entities, the intention is to immediately dissuade those planning to buy UK property with illicit funds as well as to increase transparency and public trust in overseas entities with UK land interests. The rules, which apply retrospectively, and regardless of the respectability of the overseas entity in question, will have broad impact on the real estate and financial services industries, in particular.

The Bill is split into three parts. Part 1 contains substantive new primary law providing for the registration of overseas entities. Part 2 amends existing proceeds of crime legislation providing for UWOs (the Proceeds of Crime Act 2002). Part 3 amends the Policing and Crime Act 2017 to give effect to the changes to the sanctions regime. This briefing sets out the key points in the draft Bill for each of the three parts, focusing on specific impacts for real estate and financial services businesses.

## **A REGISTER OF OVERSEAS ENTITIES THAT OWN UK PROPERTY**

### **WHICH OVERSEAS ENTITIES ARE CAUGHT?**

Entities that are governed by the law of a country outside the UK and are legal persons under that governing law will need to register with Companies House if they own UK land. So non-UK incorporated companies (even if the company is UK tax resident) and LLPs, foreign foundations and non-UK partnerships that have or elect to have legal personality, will be caught.

An overseas entity that became the registered proprietor of a qualifying estate before the Act comes into force, provided that that occurred on or after 1 January 1999 in England and Wales, will have 18 months from the date the Act comes into force to become a registered overseas entity. There are separate rules for Scotland and Northern Ireland.

### **WHO CAN ACCESS THE REGISTER?**

The register is open to the public. So, members of the public will be able to inspect the register without charge and require a copy of some or all of the register.

### **WHAT ARE THE CONSEQUENCES OF FAILING TO REGISTER?**

On an acquisition, if an overseas entity fails to register with Companies House and provide the required information of its beneficial owners then, unless it is an 'exempt overseas entity' it will not be registered as the legal owner of any qualifying estate. A qualifying estate means a freehold estate in land in England & Wales or a leasehold estate granted for more than seven years from the date of grant. Again, separate rules apply for land holdings in Scotland and Northern Ireland. In addition, a restriction will be placed on the land register so that no disposition by the overseas entity will be registered unless the disposition is exempt. An exemption will be created where the disposition is made pursuant to a statutory obligation or a court order, or a contract made before the restriction is placed on the register, or in exercise of a power of sale or leasing conferred on the proprietor of a registered charge or a receiver appointed by such a proprietor.

It will be a criminal offence both for the overseas entity and each of its officers to make a disposition of the UK land that is restricted as set out above, or to fail to provide an update on the information on the register annually, or to deliver (or cause to be delivered) misleading, false or deceptive information to the registrar. Non criminal financial penalties may also apply in the

alternative. Initial proposals included making a title transfer to an overseas entity that had failed to register void – but, fortunately, this disproportionate and unnecessarily draconian measure has been dropped.

## WHO MUST APPEAR ON THE REGISTER?

The register must contain details of any ‘beneficial owner’ of the overseas entity. ‘Beneficial owner’ is based on the definition used in the UK Persons with Significant Control (**PSC**) regime introduced in April 2016. In essence, a beneficial owner is a person who is considered to have ‘significant influence or control’ over the overseas entity (for example, any person who holds more than 25% of the shares or voting rights or can otherwise exercise significant influence or control over it), whether an individual, legal entity or a government or public authority.

The rules include detailed provisions to identify those who are registrable, including those who qualify indirectly, and sets out the information to be provided to Companies House on registration, by the overseas entity itself as well as on its beneficial owners. There is also a process for overseas entities to apply to have information protected from public disclosure in certain circumstances, and when they no longer own the UK land, to remove the relevant details from the register.

Ironically, the register will not identify in most cases the true beneficial owners of UK real estate (its intended aim); instead, it will identify those who have significant influence or control of the legal owner of the real estate asset. For example, it will identify the owner of a Luxembourg general partner (as the registered owner at Land Registry), but not those holding the economic interest i.e. the other (limited) partners in that partnership.

## WHAT IS THE IMPACT ON NON-UK TRUSTS HOLDING LAND?

Non-UK trusts that own UK land directly are not required to register with Companies House (as the trust does not have a separate legal personality). However, if an overseas legal entity holds UK land (on a trust’s behalf) that entity will be required to register with Companies House (along with any registrable entity that exercises significant influence and control over the trust).

Note that existing rules apply to the registration of non-UK trusts acquiring UK land. A non-UK trust that acquires UK land directly on or after 6 October 2020 must register with, and report to, HMRC under [The Money Laundering, Terrorist Financing and Transfer of Funds \(Information on the Payer\) Regulations 2017](#). The registration deadline could be as early as 1 September 2022. This applies whether or not the trustees have a relevant tax liability. If there is, or was, a relevant tax liability, earlier registration may be required and that is the case even if the UK land was acquired before 6 October 2020. Stamp duty land tax is one of the relevant tax liabilities.

## ACTION POINTS

Given the Bill's retrospective nature and broad impact on existing as well as prospective asset owners, and its likely imminent enactment, overseas owners of UK land should start mapping appropriate compliance arrangements and any contractual protections now. We have set out below some preliminary actions to consider.

- Identify any registrable beneficial owners and gather the information required in order to register. The information submitted will be subject to verification. If an overseas entity does not believe it has any registrable beneficial owners or is unable to identify them, or it can identify them but cannot obtain complete information about them, it must instead provide any information it does have about its registrable beneficial owners, and provide information about its managing officers. Putting a rigorous system in place now will make the annual updating requirement more straightforward.
- For counterparties dealing with an overseas entity, whether on the sell or buy side, in a joint venture, or in the letting or real estate financing context, confirmation must be sought that the overseas entity appears on the register. In addition, contractual protection should be obtained to ensure that the entity adheres to its annual updating obligation.
- Consider the impact on existing contractual arrangements, such as conditional contracts, options, rights of pre-emption and agreements for lease, already entered into and that may take a considerable time to complete. These are unlikely to address the additional compliance burden imposed on overseas entities. Note that there is no transitional arrangement in the legislation to provide protection. Therefore, compliance issues raised due to the new register may need to be addressed separately.

## **CHANGES TO THE BASIS FOR UNEXPLAINED WEALTH ORDERS**

UWOs are a potentially powerful and, arguably, under-used tool in the National Crime Agency's (NCA) armoury and are used to create an evidential presumption, for the purposes of civil recovery proceedings under Part 5 of the Proceeds of Crime Act 2002, that specific property is derived from illegitimate means and therefore recoverable. By creating the power to obtain a UWO against a 'responsible officer', such as, a board member, trustee or company officer, the intention is to sharpen the stick to encourage compliance with UWOs as well as to dissuade individuals from utilising complex ownership structures (shell companies or trust structures) to hide their beneficial interests in property.

### **HOW WILL THE AMENDMENTS TO UWOS OPERATE?**

Primarily, a failure on the part of a responsible officer to explain (to the NCA's satisfaction) the legitimate sources of property which is the subject of the UWO would lead to that property being liable to being forfeited. There are also penal notices attached to UWOs providing additional incentives on responsible officers to be able to explain sources of the wealth or income being

scrutinised; even though they are not themselves the property holders. This should tend to undermine the object of using an obscure structure to conceal one's identity or source of wealth.

The amendments would also, if introduced in their current form, create an alternative test for the High Court to apply when considering making the order sought. The court would need to be satisfied either that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property in question *or* that the property has been obtained through unlawful conduct.

The changes also herald an extension of time for authorities to investigate claims as to legitimate sources of wealth - meaning that property which is the subject of their inquiries could remain frozen for much longer. Finally, the provisions intend to limit the bases on which a costs orders can be made against the Crown as a result of the proceedings being contested.

## FINANCIAL SANCTIONS OVERARCHING REGIME CHANGES

Civil monetary penalties can currently be imposed for financial sanctions breaches on the basis that the Office of Financial Sanctions Implementation (**OFSI**) can show that the person had knowledge or a reasonable cause to expect that their activity breached sanctions legislation. The amendment would simply remove this *mens rea* element making the regulatory infringement a strict liability regulatory offence. This is a fundamental and far-reaching change to the regime.

Other proposed changes to the regime are minor in nature:

- Enabling the Minister to delegate responsibility for reviewing monetary penalties;
- Allowing OFSI to publish notices detailing violations of financial sanctions by persons in cases where it has decided not to impose a penalty; and
- Facilitating the ability of government departments, agencies and relevant bodies to share information proactively with the Treasury to facilitate OFSI's functions.

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[For background reading, see our previous insight.](#)

## RELATED PRACTICE AREAS

- Real Estate Sector
- Commercial Real Estate
- Real Estate
- Financial Services
- Financial Services Corporate & Regulatory Team

- Antitrust Class Actions
- Anti-Bribery & Corruption
- Corporate Real Estate and Funds

## MEET THE TEAM



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