

RESPONSE to BEIS call for evidence: Register of beneficial owners of overseas companies and other legal entities. May 2017



This response is submitted on behalf of Borges Salmon LLP, solicitors, of One Glass Wharf, Bristol BS2 0ZX. We have responded to only the questions relating to the impact on real estate transactions as being the area within our expertise.

Question 1: Do you agree that all legal forms that can hold properties should be in the scope of the new register's requirements? If not, what legal forms should we consider an exemption for and why?

Yes

Question 2: Is the suggested definition of leasehold appropriate?

The definition should specify whether it only applies to leases of a major interest in land or includes leases of easements. Also see reply to Question 3.

Question 3: Will setting the leasehold definition at leases over 21 years create any unintended consequences?

Many rack rented leases of business premises (in particular those used for the production of renewable energy) are granted for terms which exceed 21 years but are not "analogous to freeholds" in that a premium will not necessarily have been paid, but a market rent is. Such leases will be caught by the proposed definition, leading to an increased administrative burden on tenants occupying for business purposes. A threshold of 99 years would be more likely to catch only those leases truly "analogous to freeholds". Alternatively the definition could be refer to those leases exceeding 21 years only where a premium (of more than a notional amount) is paid.

Question 4: Do you agree that the definition of beneficial owner for the new overseas register should be aligned to the definition of PSC in the PSC regime?

We agree that the overseas ownership register should be as aligned as possible with the existing PSC register, to ensure a level playing field between UK and overseas owners of property

Question 5: Do you agree that entities that are not similar to UK companies limited by shares should use these adaptations to identify their beneficial owners?

We agree that it would be sensible to have equivalent ways to identify a beneficial owner for different types of entities, where they are not similar to UK companies. It would be helpful if the guidance was the same as the PSC register in this regard.

Question 6: Do these adaptations provide sufficient flexibility in the beneficial owner conditions to apply to most legal entities? If not, what additional adaptations should there be?

No comment.

Question 7: What methods of raising awareness would be most effective?

One of the biggest challenges with these new measures is trying to communicate these new compliance obligations to a largely unknown group – a challenge which will be significantly harder in the case of existing owners compared to new transactions and registrations.

For new transactions and registrations, the professional services firms initially consulted by the overseas entity will presumably communicate these rule changes to clients – so it is important to engage fully with the professional bodies representing lawyers, accountants, estate agents, lenders etc. to ensure awareness and if possible avoid the situation where the Land Registry application being rejected is the first the parties hear of the new regime.

It will be significantly harder to communicate these changes to existing owners. There is a service address linked to each property registered with the Land Registry, but if the property has not changed hands for many years the registered address for the owner may no longer be up to date. We suspect it will be administratively difficult to ensure notifications actually reach all existing owners to inform them of their new obligations. We assume the Land Registry will be consulted explicitly as to its capacity to undertake such a tracing and notification exercise at a time of significant backlog in completing registrations.

For this reason we suggest the new disclosure requirements should only be imposed on new real estate transactions in UK property, not existing owners.

Question 8: Do you have any information that is relevant to our assessment of the cost and benefits of the policy to businesses, society and the economy?

In many cases it will be UK real estate lawyers who first bring the new rules to the attention of overseas entities proposing to purchase or let UK land. These lawyers will not necessarily be over familiar with the rules of the PSC Register and if they infrequently deal with overseas entities may overlook the requirements altogether. So there will be occasions where transactions are not registered effectively sterilising the property in respect of subsequent dealings and leading to problems with the priority status of third party interests granted after the unregistered transaction but registered on the title. Even when fully aware of the requirements they may not be able to determine precisely how the rules apply in the context of overseas corporate or other structures and may need to obtain an opinion from lawyers in the relevant country. Both situations will inevitably delay and increase the cost of transactions.

It is not uncommon for property holding companies or SPVs (special purpose vehicles) to be incorporated only days in advance of a transaction, therefore, the registration will ideally need to be online and fully automated to allow for real time registrations. If real time registration is not viable, Companies House will need the capacity to offer a fast-track registration service (we would suggest 24 to 48 hours), in order to accommodate the fast paced nature of real estate transactions. This could be an optional paid for service if necessary, but it must be available in order to ensure that the transactions are not delayed unduly by these rules.

The proposed rules also pose particular concerns for real estate transactions where there is a delay between paying a deposit and completing the transaction. For instance, where homes are purchased off-plan, a purchaser may pay a deposit several years before completing the transaction. This could pose issues where the purchaser pays a deposit, but the vendor is subsequently prevented from transferring the title to the flat if they have not complied with these new rules. This could create a consumer protection issue, particularly if deposits are put at risk. Furthermore, if people are put off from buying off-plan because of the perceived risks associated with these rules, this would jeopardise funding for the development of new housing. It is therefore important that the rules provide some

safeguards where there is a time lag between purchasers paying deposits and the transaction completing.

Question 9: What, if any, impact do you think that the proposed policy will have on the UK property market (residential and commercial)? Please describe the impacts and provide evidence.

For the reasons set out in our response to question 8, the legal cost for an overseas entity buying or leasing UK land is likely to increase considerably which may act as a barrier to investment.

Question 10: Do you agree that the duration of the period given to overseas entities to comply with the new requirements should be one year?

There will be occasions where UK property has been owned for many years by an overseas entity and the proprietors address shown on the Land Register is no longer current. Many overseas owners will visit the property infrequently or it will be let. As a result it is very possible that the notification of their new responsibilities will not reach the overseas owner and the first they will learn of it is when they decide to sell or grant a lease of the property.

Given the severity of the sanctions and the difficulties in communicating these rules to a largely unknown investor base, we would recommend that these new requirements are only imposed to new transactions in real estate, not on existing land owners.

If the government is commitment to imposing these rules on existing owners of UK property, the transitional period should be much longer than one year. The severity of the sanctions may encourage people to sell their property before the rules come into force, which could impact upon valuations if many investors decide to sell in the space of one year. If the transitional period is longer, investors may not feel rushed into making a decision about selling – and a longer period to make the sales will minimise the potential market impact.

There should also be provision for extensions of time where it can be demonstrated the notification did not reach the overseas owner.

Question 11: Is a system of statutory restrictions and putting notes on the register, backed up by criminal offences, a comprehensive way to ensure compliance?

In the case of new purchases, charges or leases it is likely to be very effective.

In the case of those overseas entities who already own UK land this is retrospective legislation and criminal sanctions are draconian. If criminal liability is to be imposed, there should be sufficient statutory defences to protect those who fail to comply because they have not become aware of the new law if a notification failed to reach them. Otherwise in effect they will suffer criminal penalties for the “offence” of not keeping their address at the Land Registry up to date. We suggest BEIS undertake discussions with the Land Registry about the likely proportion of addresses in the proprietorship register which are out of date.

Question 12: Do you agree that we should prevent any beneficial interest in the property passing to an overseas legal entity that does not have a valid registration number at completion or settlement?

In England and Wales, the beneficial interest will already have passed on exchange of contracts. It will be important to avoid the risk that a transaction will be voided or transfer of beneficial ownership prevented when a deposit or balance has already been paid by the purchaser to the overseas owner as it may not be recoverable. The rules should therefore provide that the beneficial interest is

revoked and for a statutory right to the other party to rescind the contract if the overseas legal entity has not obtained a registration number by completion. Otherwise there will be issues over whether the default provisions in the contract have been triggered entitling the other party to rescind and the other may be locked into a contract that cannot be completed. Rules should also provide for the situation where a party contracts to buy, take a charge or lease from an overseas entity with a valid registration which lapses in the period between exchange of contracts and completion because of the failure to update the details within the prescribed period.

Question 13: Do you agree that the most appropriate way to do this would be to void the transfer document?

Yes if the preceding contract has not already been rescinded as suggested in our reply to question 12 and subject to our response to question 12.

Question 14: Is there another way that we could achieve this result?

We are aware of nothing which would be as effective.

Question 15: Which is your preferred option for procurement and why?

No comment.

Question 16: Do you agree that the information on the new register for overseas entities should be the same as the information required under the PSC regime?

Yes.

Question 17: Do you agree that entities unable to give information about beneficial owners should be asked to provide information about their managing officers?

Yes.

Question 18: Is there any additional information that we should ask for from entities that are unable to give information about their beneficial owners?

No comment.

Question 19: Is a requirement for an update every two years appropriate?

2 years is not a long time interval given that many properties will be held by the entity for much longer periods without any sale, charge or lease taking place. Certain land contracts or options may extend well beyond 2 years so a compliant company on exchange may easily become non-compliant in the interim. It may be that most of the objectives would be achieved if following initial registration on the proprietor, the purchase, lease or charge there is no requirement to update until the overseas entity proposes to dispose, re-let or otherwise deal with the property or until the beneficial ownership actually changes. If there is to be an updating requirement regardless of any proposed dealing or change in beneficial ownership then we would suggest 5 years as in most cases that should be long enough to avoid the issue of compliant companies on exchange of contracts becoming non-compliant at the time the contract comes to be completed.

Question 20: Would a criminal offence be an appropriate way of enforcing the requirement to update information?

A criminal offence would appear to be excessive given the restriction on the title will effectively prevent dealings without compliance and in many cases it will be a

criminal offence committed by omission because reminders have gone astray or the need to update has been overlooked.

Question 21: Do our proposals achieve the right balance between ensuring compliance and enabling overseas entities to maintain existing assets?

We consider these rules strike the right balance between compliance and transparency in respect of new real estate transactions. However, the imposition of a criminal offence on existing owners of failure to provide the information within 1 year is disproportionate retrospective legislation unless accompanied by a defence that the requirement has not come to the attention of the entity. Most existing owners will have no occasion to consult a UK conveyancer or check their Land Register address details are up to date until they decide to sell, let or charge the property. Criminal penalties will have no deterrent effect unless those involved actually know of the rules. Criminal offences should be reserved for "active" wrongdoing such as supplying false information as in Section 112 of the Companies Act 2006. We question how practical or cost effective it will be to enforce criminal sanctions against those living abroad in any event.

Question 22: Are these mechanisms enough to deal with situations where bidders provide false beneficial ownership information or do not keep their information up to date?

No comment.

Question 23: Do you think that this provides the correct balance between protecting individuals from harm and ensuring transparency of how properties are owned?

Yes, subject to our reply to Question 24.

Question 24: Are there additional situations we should consider where protections should be granted?

We would welcome a wider list of criteria where people can apply for anonymity, particular in relation to the ownership of their family home.

Question 25: Are there other situations where exemption from putting information on the register should be permitted for entities participating in procurement?

No comment.

Question 26: How can we best ensure that only legitimate lenders are able to repossess and dispose of a property with a restriction against it?

We welcome the government's recognition that a lender's security over a property must be protected – and they should not be prevented from repossessing and disposing of the asset in the event of default. We would suggest that this protection should be extended to administrators and insolvency practitioners who may need to step in as officers of the company. Alternatively, provision could be made for lenders who have the relevant information as to the beneficial ownership of the entity to be permitted to supply it in satisfaction of the restriction.

We recommend that this protection should be granted to any lender which is not connected to the borrower/property owner.

Question 27: We are interested in views and evidence of other commercial transactions that could be disrupted by the proposed restrictions regime.

Leases with security of tenure etc

Several statutory regimes provide tenants with a right of renewal or extension of leases in certain defined circumstances. These include the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993. The impact of the new rules on these statutes would have to be considered – possibly to include a statutory right for the landlord to refuse to renew the lease to a non-compliant overseas entity. Otherwise they would be left in the unenviable position of having a statutory duty to grant a lease which would inevitably be void. However it must be borne in mind that these leases may have changed hands or been mortgaged at a price or valuation which took into account of the statutory right to renew or extend so removing these rights in the case of UK co-owners without compensation may be seen as disproportionate. There is also the potential impact on the right of first refusal under the Landlord and Tenant Act 1987 where the tenant wishing to exercise the right is a non-compliant overseas entity.

Rights to acquire the freehold

Again various statutes confer these rights and would need amending to take account of any restriction on the ability to register a transfer to a non-compliant overseas entity, particularly in the case of collective enfranchisement rights under the Leasehold Reform, Housing and Urban Development Act 1993 and the right of enlargement of a long lease to the freehold under s.153 Law of Property Act 1925. The same point applies as in relation to statutory rights of renewal in relation to UK co-owners being deprived of these rights without compensation.

Options

Many options will have been granted to or by overseas entities before these provisions were enacted or even thought of. In such a case the other party to the transaction may end up having paid for the grant of an option and failure to comply with the obligations to register would be a very easy way for the overseas entity to escape its contractual obligations to buy, sell or lease which had become commercially undesirable.

"Lift and Shift" on development sites

Leases (and other documents) may contain obligations on the tenant (or other party) to exchange a small part of the premises for other land to facilitate future development. These take effect in law as an agreement to surrender/transfer part and for a sale or lease of the new land, in the case of a lease for the residue of the original term. Such an obligation could be rendered unenforceable against a non-compliant entity and development thwarted.

Question 28: Are there additional third party impacts that should also be addressed?

See our response to question 27. In addition:

In order to spread risk and pool resources, it is very common for real estate investments and developments to be owned in a joint venture arrangement. Given the retrospective nature of these rules, there is a risk that a minority investor in a joint venture could be penalised by these rules if other beneficial owners in the structure do not comply with the rules. In order to protect against this, we would reiterate our recommendation for the rules to only apply to new real estate transactions.

In addition, and as noted in response to question 8, purchasers that buy apartments "off plan" will typically pay a deposit a number of years before they complete on the purchase of their home. If the developer or vendor does not comply with their disclosure requirements in this time, there is a risk that the purchaser cannot obtain title of the apartment – and their deposit could be put at

risk. It is important that the rules can accommodate for this situation and provide sufficient consumer protection. It is important to ensure that off plan sales remains an attractive way of buying homes as they currently provide significant levels of forward funding which allow development of new homes in the UK.

Indeed the beneficiary of any agreement to sell, take or grant a lease or charge already registered against the title held by an overseas entity will be potentially unable to enforce its rights once the proposed restriction is in place but may have no control over compliance by the overseas entity.