

A register of beneficial owners of overseas companies and other legal entities: Call for evidence

We welcome the opportunity to respond to the call for evidence issued by the Department for Business, Energy and Industrial Strategy on 5 April 2017.

We note that the proposed register of beneficial owners of overseas companies and other legal entities is one of a number of initiatives which form part of the government's "commitment to improve transparency of company ownership".

The UK government's initiatives form part of a wider, global effort to create a more transparent business environment. These initiatives include the EU's Fourth Money Laundering Directive.

We support the government's aim of making all efforts to prevent the UK being used as a centre for money laundering and other financial crimes.

However, the obligations created by these initiatives should not place an undue burden on entities and businesses such that the UK becomes a less attractive jurisdiction within which to do business.

Likewise, compliance requirements should not be a substitute for 'policing' and catching those who are determined break the law and will attempt to circumvent any new requirements such as these proposals.

Therefore, we agree with the aim set out at page 14 of the call for evidence, that the proposed register should "avoid creating disproportionate burdens or put off legitimate investors".

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

1.1. The call for evidence appears to relate primarily to 'transparency of company ownership' (the ministerial foreword refers). However, there are a number of different entities which can own property, such as trusts and partnerships.

1.2. For the reasons set out in the call for evidence at paragraph 26, we agree that all legal forms that can own properties should be within the scope of the new register's requirements.

1.3. However, the benefits of such a register do need to be weighed against the increasing regulatory burden facing entities doing business in/with the UK.

1.4. As part of the transposition of the EU 4th Anti-Money Laundering Directive into UK law, it is the intention for there to be an online register of the beneficial ownership of trusts. This

obligation will include offshore trusts to the extent that a trust has ‘tax consequences’ (for example, a liability to UK Inheritance Tax).

1.5. If trusts are also to fall within the scope of the register which is the subject of this call for evidence, there is a risk of creating an overly burdensome framework of regulatory obligations on overseas entities with some connection to the UK. It should also be borne in mind that many entities will have other regulatory obligations, such as the requirements of the Common Reporting Standard.

1.6. In summary, the type of entities which fall within the scope of the register must be set out clearly; those entities must have clear guidance; and, as far as possible, those entities should be not subject to multiple, over lapping obligations.

2. Is the suggested definition of leasehold appropriate?

2.1. We understand the proposed definition targeting overseas entities where the lease is over 21 years allows for consistency across the United Kingdom. This is to be welcomed.

3. Will setting the leasehold definition of leases over 21 years create any unintended consequences?

3.1. We note that it would be possible to carve out a potentially significant leasehold interest lasting just under 21 years that would not be brought within this legislation; this might encourage such leases.

3.2. We also note that it implies it is aimed at leases that are initially for a term of more than 21 years; we note this implies it may be possible to extend an unregistered leasehold interest at some point so that it continues to falls outside the scope of the legislation but the effective total length exceeds twenty one years.

3.3. Without suitable anti-avoidance rules, this might encourage a person wishing anonymity to take a series of short leases from a friendly party who does not have a concern about being on the register.

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?

4.1. Given the increasing number of regulatory obligations on entities, it is important to keep the obligations as streamlined as possible. Where possible, definitions should be consistent across different regulatory regimes.

- 4.2. Further, it appears that part of the rationale behind the new register is to have a ‘level playing field’ for UK and non-UK entities that own UK property. As a consequence, the definitions should be aligned.
- 4.3. However, if trusts are to be included within the definition of entities that need to register their beneficial ownership information, then clearly the definition of beneficial owner in relation to a trust will need to be clearly defined.
- 4.4. Although there is a definition of a person who exercises significant control over a trust in the PSC guidance issued on 14 April 2016 this does not, for example, explicitly include a settlor or beneficiary of a trust.
- 4.5. In our opinion this is not adequate for the purposes of the register which is the subject of this call for evidence. Also, this definition is not in alignment with the definition of trust beneficial ownership per the EU 4th Anti-Money Laundering Directive.
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?**
- 5.1. Per our answer to question four, where possible the definitions should be consistent with those used for the PSC register.
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?**
- 6.1. These definitions may be suitable to the extent that the obligation to register is restricted to entities which are in some way similar to a company.
- 6.2. They will not be sufficient if trusts fall within the definition of legal entity for the purpose of this register.
7. **What methods of raising awareness would be most effective?**
- 7.1. We welcome the proposal mentioned at paragraph 45 of the call for evidence that all overseas entities that own UK property before the law comes into force will be written to setting out the requirements and consequences of not complying.
- 7.2. In addition to this, we highlight the following passage from the Government’s response to the recent consultation on the transposition of the EU 4th Anti-Money Laundering Directive:

“estate agents act as a key facilitator of the transaction and may be the only regulated professional whom the buyer encounters when purchasing a property. The government will clarify that for the purposes of the regulations, an estate agent is to be considered as

entering into a business relationship with a purchaser as well with as a seller. This means that estate agency businesses must apply CDD to both contracting parties in a transaction.”

7.3. As a consequence, given that under these proposals estate agents will be required to identify the ultimate beneficial owners of non-UK entities looking to acquire UK real estate, it would seem that estate agents are ideally placed to inform any potential purchaser of UK real estate of the requirements of the proposed register.

7.4. Property transactions will also generally involve a solicitor. High value transactions involving offshore structures are also likely to involve tax advisors and/or accountants. The UK government should ensure (perhaps in conjunction with regulatory bodies such as the Law Society and ICAEW) that such advisors are made aware of the requirements.

7.5. However, we do not consider that there should be an enforceable obligation on advisors to provide such advice. The obligation to register (and associated sanctions for failure) must always lie with the legal owner.

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?

8.1. No comment

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 advice.

9.1. The proposed policy may have a detrimental impact on the value of the UK property market.

9.2. We set out below three reasons why this may be the case (this is not meant to be an exhaustive list).

9.2.1. Residential property transactions very rarely take place in isolation. As a rule, there is a chain of buyers and sellers, with each property purchase being dependent upon the release of sale proceeds from another sale. It can be envisaged that a voided transaction could well cause difficulties throughout an entire chain.

9.2.2. If applications for registration are delayed or a backlog of registrations arises, this may well cause property transactions to fail.

9.2.3. There may be valid reasons as to why a purchaser wishes to protect their privacy for, e.g security purposes, but these reasons are not deemed sufficient for an exemption from the requirement to register. As a consequence, such purchasers may decide that the UK property market is not as attractive. This could have a knock on effect on property values.

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

10.1. A one year transitional period does appear appropriate given the message needs to be transmitted to an international audience.

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

11.1. Commercial penalties, such as statutory restrictions and prohibitions on leasing, mortgages and sales, and criminal penalties, in the worst cases, are likely to encourage compliance.

11.2. This approach would be more effective than, say, a simple, financial penalty.

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?

12.1. Yes, otherwise it may be possible in some way to circumvent the purpose of the obligation through a transaction which splits beneficial and legal ownership of the real estate, but with both beneficial and legal ownership nevertheless changing hands.

12.2. However, this would leave the selling party holding the property on trust for the entity which was scheduled to purchase the property. Trusts have consequences in UK tax law. Consequently this proposed remedy, applied at completion rather than an earlier stage in the purchase, could cause serious and unnecessary taxation complications. Voiding the transaction or preventing it proceeding should therefore be imposed in order to stop exchange (or the equivalent stage in Scotland etc) not completion (see further at 14 below).

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

13.1. Although voiding the transfer is one way of stopping the transfer of ownership of property to a non-compliant transferee, it does raise questions about the timing of the voiding and what happens to taxes such as SDLT and VAT that might have been paid on the transfer once it is voided and how these are refunded.

13.2. There are also questions about the obligation to insure a property which, we understand, can be triggered at exchange of contract, rather than completion.

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

- 14.1. We would favour a system that stops a transfer from happening before the transferee is fully compliant, i.e. where it is not possible for the land registration to occur without certain pre-conditions as to compliance being in place.
- 14.2. It may be preferable for there to be an obligation for registration to take place before exchange takes place or before an offer can be accepted.
- 14.3. Estate agents should be able to advise against accepting an offer where they are aware that the purchaser is an unregistered, offshore entity.

15. Which is your preferred option for procurement and why?

- 15.1. No comment

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 register?

- 16.1. Our response to Question 4 refers.

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

- 17.1. Yes, although there will need to be an obligation to undertake all reasonable endeavours to identify beneficial owners. In many cases, there should already be in place an existing framework for this information to be obtained.
- 17.2. For example, where the Directors of a company are provided by a Trust and Corporate Services Provider, that provider is likely to have Anti-Money Laundering obligations which ought to mean that they are able to identify their clients - which in many cases will be the beneficial owners of the company.
- 17.3. We also note that the legislation transposing the provisions of the EU 4th Anti-Money Laundering Directive into UK law will oblige estate agents to carry out Customer Due Diligence in respect of both the vendor and purchaser of UK real estate. Professionals involved in advising on the purchase e.g. solicitors also have to undertake these checks before they commence work so there should be no or very few occasions on which beneficial ownership information is unavailable.
- 17.4. Once this legislation is in place, it should not be possible for an acquisition of UK real estate by a non-UK resident entity to take place without the beneficial owners being identified.

17.5. We consider it appropriate, as suggested at paragraph 86, for there to be an offence for anyone knowingly or recklessly to provide false or misleading information.

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

18.1. See our answer to question 17.

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

19.1. As stated previously, there should be parity between the obligations in respect of the proposed register and other registers of beneficial ownership so that updates are all required at the same frequency.

19.2. To have different requirements under different regimes adds to the administrative burden placed on those entities which need to comply with the requirements.

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

20.1. In our opinion, unless set at a significant level, a financial penalty, for example, is unlikely to drive compliance, particularly given the potential difficulties in collecting any such penalties.

20.2. A criminal offence is more likely to encourage compliance as any such sanction has wider potential (e.g. regulatory) implications.

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

21.1. As stated previously, provided the obligations created under the terms of the new register effectively mirror the obligations under the PSC, then we consider them to be reasonable.

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?

22.1. No comment.

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

23.1. Yes. However, we consider that the security risk to individuals arising from making the register public should not be underestimated, particularly where the risk may arise to an individual in an overseas jurisdiction.

23.2. We also note that the UK government's Information Commissioner's Office recently warned of the risks arising from making trust registers fully open to the public.

23.3. Full consideration must be given to the potential risks. There should be an appeals process where an application for exemption is refused in the first instance.

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

24.1. No comment

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

25.1. No comment.

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

26.1. It may be appropriate to impose on lenders a system that requires the lender to be registered, perhaps under a private registration up to the point, if it occurs, when it exercises its right to take over the property.

26.2. For existing borrowing situations this may not be practical without a transitional process for the lender to register aligned with that suggested for existing borrowers.

26.3. It may also be appropriate to restrict the transfer of 'excess' sale proceeds to the legal owner over and above the mortgaged amount until the legal owner is able to provide the relevant beneficial ownership information that would be required for registration.

26.4. A further suggestion may be for lenders to obtain clearance from a relevant UK government body prior to carrying out a forced sale/repossession.

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

27.1. We wonder what is envisaged for situations where a vendor has exchanged on the property and received part payment and the transaction is ultimately voided; for example, would they be entitled to deduct costs from any cash already received.

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

28.1. There may be situations where tenants are forced to move if leases cannot be renewed because of a failure on the part of the legal entity to comply with its obligations to register beneficial ownership information.