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Bond Dickinson

www.bonddickinson.com

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Bond Dickinson LLP

St. Ann's Wharf
112 Quayside
Newcastle upon Tyne
NE1 3DX

Tel: 0345 415 0000
Fax: 0345 415 5256
DX: 61191 Newcastle upon Tyne

[redacted]

Our ref:
VJW2/FR1/900006.94
Your ref:

Beneficial Ownership Team
Department for Business, Energy & Industrial Strategy
1st Floor Victoria
1 Victoria Street
London
SW1H 0ET

By post and email

Email: transparencyandtrust@beis.gov.uk

Dear Sirs

Register of Beneficial Owners of Overseas Companies and other Legal Entities - Response to the Call for Evidence issued on 5 April 2017

We set out below our response to the call for evidence.

Our response is made on the basis of English law and property which is situated in England or Wales and registered or registrable at HM Land Registry. The only exception to this is part (f) of our response to Question 11 which relates to Scottish property and the Land Register of Scotland.

References to paragraph numbers are to numbered paragraphs in the call for evidence.

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?

No, we do not agree that the suggested definition is appropriate. Paragraph 30 states that the aim is only to catch leaseholds that are analogous to freeholds. Presumably this means leases that have a capital value. On that basis we consider that the proposed 21 year period is too low and would create a disproportionate compliance burden. Although lease lengths have shortened in recent years, it is still not uncommon for "rack rented" leases to be granted for 25 years or longer. On the other hand, leases analogous to freeholds (i.e. with a capital value) are generally granted for periods of between 99 and 999 years and in our experience never shorter than 50 years. We suggest that the shortest appropriate period would be 40 years, but 50 might be more appropriate.

In addition, it would be appropriate for the registration requirement to be triggered by the number of years remaining unexpired at the time the beneficial ownership registration requirement is triggered, rather than the term for which the lease was originally granted. This is necessary to reflect the fact that the

registration requirement will apply on the assignment of existing leases as well as the grant of new leases, and to avoid a far larger number of leases being caught by the requirements than is intended or justifiable.

Question 3:

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

We consider that it would create a disproportionate compliance burden, as stated in the response to Question 2. We note that the aim of the proposed register is to avoid this (see paragraph 21).

It is difficult to predict what effect setting the definition at this level might have on the real estate market. However, it is conceivable that parties who were not otherwise subject to the registration requirements might choose to grant or take leases for a shorter lease term with an option to renew, in order to avoid the requirements. This would distort the market, increase transaction costs and affect SDLT receipts, all of which would be unintended consequences.

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?

Yes.

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?

Yes.

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?

Yes, but subject to a review of the more detailed guidance when published. There must also be a question mark over whether all possible legal entities in all overseas jurisdictions can be catered for.

Question 7:

What methods of raising awareness will be most effective?

We suggest that details of the proposals should be posted on the government website and circulated via government Twitter feeds. Press releases should be made to encourage coverage by TV, radio and the written media. Announcements in UK newspapers might also be helpful.

It will also be important to inform the relevant professional bodies whose members act for overseas

entities on UK property transactions (such as RICS, ARLA, national Law Societies, the Solicitors Regulation Authority and equivalent organisations).

We also agree with the suggestion in paragraph 45 (of writing to all overseas entities that own UK property before the new requirements come into force, and writing to them again 3 months before the end of the initial one year period).

Question 8:

Do you have any information that is relevant to our assessment of the costs and the benefits of the policy for businesses, society and the economy?

The proposed changes would bring a small benefit in terms of helping to combat money laundering and helping with "know your client" checks, but this may be outweighed by the additional regulatory burden involved in obtaining and filing the necessary information and keeping it up to date and for all parties when transacting with overseas entities.

Question 9:

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

We do not anticipate that the proposals will have a long-term adverse impact on the UK residential or commercial property market. However, there may be short-term impact in terms of delayed or aborted transactions while the changes bed down.

The above comment relates to the proposals as a whole, and is made on the assumption that issues of concern on the detail of the proposals will be satisfactorily resolved. For comments on the areas of concern which we have identified, please see our responses to other questions.

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?

On balance we agree that the appropriate period is one year. Less than one year would be too short for practical purposes. We consider that a whole number of years would be best as that is clearest and easiest to remember. One year should be sufficient but is also short enough to concentrate the mind. If a longer period was given, overseas entities might be inclined to put off the work required to comply with the requirements. This could ironically result in there being more non-compliant entities at the deadline than if the period was one year.

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?

There is no means of ensuring 100% compliance, but we agree that the proposed system would be effective in ensuring compliance as far as possible. However, for the system to work effectively it must be clear and workable. We have some concerns on the detail of the proposals and summarise these concerns below:

(a) The proposed restriction is that a non-compliant overseas entity will not be able to sell the property, let it for a long period or create a legal charge over it unless it first complies with the registration requirements. Two issues require clarification here:

I. The terminology used in the call for evidence is inconsistent in that it refers in some places to sale and in others to transfer (transfer is broader than sale and would include other transactions such as gifts). The types of disposition affected need to be precisely identified. Is the intention that the restriction will apply to all transfers or just to sales? If the latter, how is "sale" to be defined (would a sale at an undervalue or for nominal consideration be caught, and how is consideration to be defined given that consideration may be monetary or non-monetary)?

II. It is not clear what is meant by "long lease". Is the intention that this will be a lease for the same length of term as will trigger the registration requirement? For our comments on that see our response to Questions 2 and 3.

(b) The proposals refer to a "note" being put on the register of title to reflect the restriction on dealings referred to in (a) above. However, it is not clear how such a note would actually prevent registration of any of the prohibited dealings. The appropriate HM Land Registry entry for this purpose is a "restriction" (see HM Land Registry Practice Guide 19: notices, restrictions and the protection of third party interests in the register).

(c) The wording of HM Land Registry restriction will require careful consideration and will need to reflect the practical position. We envisage that when finalised the form of restriction would become a new standard form of restriction under the Land Registration Act 2002. We would strongly urge a further consultation on the detailed wording of the restriction (and the land registration procedure generally) prior to adoption.

(d) There are issues to consider in relation to the wording of the restriction and also how the restriction will operate:

i. Paragraph 51 states that any overseas entity applying to register itself as the legal owner of property will be required to provide its overseas registration number on the application, and that HM Land Registry will use the registration number supplied on the form to check that the entity has indeed provided its beneficial ownership information to Companies House and updated it as required. The wording of the restriction needs to be consistent with this process.

ii. HM Land Registry may not have sufficient resources to carry out the necessary checks. It is vital that the necessary resources are put in place before the new rules come into force, to avoid registrations being delayed.

iii. The restriction needs to be carefully worded so that it is clear exactly what is required for the restriction to be complied with (both for ease and consistency of operation of the restriction by HM Land Registry staff, and also so that the parties to a transaction can objectively verify, before the registration application is submitted, that any requirements set out in the restriction have been complied with). It will not necessarily be straightforward to draft the restriction, given the complexities of the beneficial ownership registration requirements: see in particular paragraph 85 and 86 (dealing with entities which are unable to provide information about their beneficial owners) and paragraphs 87-90 (proposed requirement for such entities to provide information about managing officers). However, it needs to be kept as simple and straightforward as possible (see also our comments in (e) below).

iv. Compliance with the registration requirements will have to be required as at the date of completion of the transaction, rather than the date the application is made. Consideration also needs to be given to how to protect buyers/lessees/mortgagees if the seller's beneficial ownership registration is in order at the time the transaction is completed but a problem arises later, before HM Land Registry application is completed (e.g. if a

transaction is completed on 15 May and the application is submitted to HM Land Registry on 29 May, but on 22 May the seller's two year period for updating its beneficial ownership information expired without the information being updated, then HM Land Registry will discover the non-compliance when it checks the position at Companies House, but the registration should still be completed).

(e) As mentioned in (d) above, it is vital that parties to a transaction can objectively verify, before a registration application is submitted, that any requirements set out in the restriction have been complied with. For this to work, not only must the wording of the restriction be absolutely clear, as mentioned above, but it must also be possible to check easily and reliably at Companies House whether the relevant entity has a registration number, is up to date with its registration requirements and when its beneficial ownership details must next be updated. When parties are negotiating a transaction and there is a restriction on the title, they will need to carry out these checks at Companies House at an early stage as part of due diligence, consider whether provisions need to be included in the contract to address compliance with the registration requirements, and then negotiate those provisions. The checks at Companies House will then likely have to be repeated before completion. This will inevitably increase transaction costs. It would in our view be wholly inappropriate to push the burden of verification of actual compliance on to legal professionals acting for a buyer of property from an overseas entity. It is therefore vital that the position be kept as simple and straightforward as possible and that there is an absolutely clear set of assumptions which a buyer (and its legal advisers) can rely on in terms of the seller's compliance with the registration requirements. Without this, a legal professional acting for the buyer will be unable to advise its client, or its client's lender, whether an overseas entity seller is lawfully capable of completing a transaction, and a new clog will have been added by stealth.

(f) The Land Register of Scotland has no entry equivalent to the HM Land Registry restriction, capable of preventing registration of a disposition unless specified requirements are met. Consideration therefore needs to be given to how compliance with the beneficial ownership registration requirements will be ensured in relation to overseas entities that own or acquire Scottish property.

Question 12:

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

We have concerns about the proposal for no beneficial interest to pass in this situation. Please see our response to Question 13.

Incidentally, it is not clear what "valid registration number" means in this context. The proposal is that overseas entities will be required to update the register at least every two years, so presumably HM Land Registry will only treat a registration number as "valid" when their checks show that the registration has been made (or properly updated, as the case may be) within the past two years. The precise detail of the requirements needs to be absolutely clear (for more detailed comment on this aspect please see our response to Question 11 above).

Question 13:

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

We have serious reservations about this proposal. While the aim will be to ensure compliance, there will inevitably be transactions where the overseas registration requirements are not complied with, or not fully complied with. The new legislation needs to cater sensibly and fairly for this, taking the background law into account.

We have the following concerns:

(a) Significant funds may have been transferred from one party to another as part of the transaction. It would be unacceptable in this situation for the relevant party to acquire no interest at all, and for there to be no protection for those funds. What would the status of the funds be in the hands of the recipient? Would they hold them on trust for the paying party and/or be under a duty to return them? What if the recipient suffers an insolvency event?

(b) The proposal might also indirectly affect third parties if any associated or subsequent transactions had been entered into with such parties on the assumption that the void transaction was valid. The third parties concerned would not necessarily become aware that the void transaction was void. The legal status of any such associated or subsequent transactions would be uncertain. This is inherently unsatisfactory.

(c) The proposals do not make clear whether the underlying contract would also be void where the transfer/lease/charge was void, or whether the obligations would continue in that situation. This needs to be clarified.

Question 14:

Is there another way that we could achieve this result?

The other proposal mentioned in the call for evidence is that where the buyer/lessee/mortgagee has not complied with the registration requirements it will not acquire legal title but only the beneficial interest, with the seller holding the property on trust for the buyer. This would avoid the concerns set out above, but would also cause various technical problems summarised below:

(a) Under section 27(1) of the Land Registration Act 2002 a disposition of registered land is not effective at law until registered at HM Land Registry (the disposition itself is only effective to transfer the beneficial interest). When the disposition is registered the registration is effectively backdated to the date of the registration application, but during the "registration gap" the legal and beneficial interests are in different hands and this causes problems with issues such as service of notices (in some instances it is the legal owner that must give or receive the notice if it is to be valid).

The proposal in the call for evidence would create a similar situation, but with important differences. In the existing registration gap situation created by the Land Registration Act 2002 it is (or should be) within the control of the transferee to ensure that the registration application is successfully made and that they acquire legal title, but with the overseas entity proposals the position may be more complicated. It might be that the existing registered proprietor or the transferee is an overseas entity, or they could both be overseas entities. It would not be fair for an "innocent" party to the transaction to be prejudiced by the fact that another party that was an overseas entity had failed to comply with the overseas entity registration requirements. This split ownership of the legal and beneficial interests could also adversely affect third parties with a legal interest in the property such as tenants and lenders.

(b) The call for evidence also does not say what would happen in this situation if the registration requirements were subsequently complied with. Would the transaction then be capable of being "perfected" and if so how?

Given the existing law, we consider the only two ways of preventing any beneficial interest in the property passing to an overseas entity that has not complied with the registration requirements would be to make the transfer or other relevant disposition void, or to provide for the seller to hold the beneficial interest on trust.

Question 15:

Which is your preferred option for procurement and why?

We prefer option 2. Options 1 and 3 carry the risk of taking a bidder all the way through dialogue/negotiations, only at the end to exclude them for failure to provide the relevant information – this potentially dilutes the competition and 'wastes' an opportunity to engage only with bidders who are capable of being awarded the contract. It is also not clear under options 1 and 2 what measures an authority would have to take in respect of the information supplied ie are bidders required simply to produce the information, but without a mechanism for checking the information provided is genuine? Option 2 provides clear legal grounds for the exclusion and weeds out early on in the competition those who cannot or are not willing to comply with the disclosure requirement.

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?

This requirement goes beyond the PSC regime. As such, we would query whether it reflects the principle at the heart of the trust and transparency measures in terms of identifying those who genuinely own and exercise control over a legal entity.

There is too little information on this proposal to allow us to comment on it fully. In particular, much would depend on how "managing officer" was defined (paragraph 90 merely says "a broad definition of managing officer will be created", without giving any indication of what the definition might encompass). Also, there is no indication as to what if any penalty is proposed for failure to comply with the requirement to provide details of managing officers.

Overseas entities may be structured so as to keep beneficial interests private, sometimes for quite legitimate reasons, so a requirement to provide details of managing officers might deter overseas entities from investing in the UK property market.

Question 18:

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

No.

Questions 19:

Is a requirement for an update every two years appropriate?

Yes, we agree that two years is an appropriate interval.

Question 20:

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

Yes.

Question 21:

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

Yes, subject to our responses to the other questions.

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?

Yes, the approach outlined in the two mechanisms seem sensible, balancing the right to terminate against the interest in continuing the contract if required.

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.

Question 24:

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

None that we are aware of.

Questions 25:

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

No.

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 suggest that lenders who are connected to (i.e. own or control) the registered owner be prevented from repossessing and disposing of a property with a restriction against it.

The exception allowing lenders to repossess and dispose of a property with a restriction against it will need to allow for all the possible ways in which a lender may wish to enforce its security, including disposals by a receiver appointed by the lender, disposals by the lender once it has taken possession, and disposals by an administrator/administrative receiver/liquidator (or equivalent overseas officer) of the registered owner. It should be noted that an officeholder realising the security may have been appointed by someone other than the lender (for example the registered owner or its directors), and the exception would need to allow for this in order not to limit lenders' enforcement options.

We would advise against allowing only regulated lenders to repossess and dispose of a property with a restriction against it, as this would be unfairly prejudicial to the potentially large number of unregulated lenders in the UK property market. It is important to remember that charges benefit many individuals and entities other than regulated lenders and are used in a variety of situations. For example, they are frequently used to protect overage/clawback. We understand it is the policy of certain government departments and agencies such as the MoD to protect such payments in this way, so government would itself be adversely affected if only regulated lenders were permitted to repossess and dispose of a property affected by a restriction.

Question 27:

We are interested in views and evidence of all commercial transactions that could be disrupted by the proposed restrictions regime?

Complicated commercial transactions can take a long time to come to fruition, for example conditional sale contracts where the completion date is not fixed at the outset but will be decided later by reference to specified factors and may be many months or years after exchange of contracts. A beneficial ownership registration that was up to date at the outset of the transaction may therefore become out of date before completion. This creates risk for the other party or parties to the transaction as the entry of HM Land Registry restriction will mean that completion of the transaction will be disrupted if the overseas entity is not in compliance with the registration requirements at the date of completion. Any such contract will therefore need to oblige the overseas entity to comply with the registration requirements, and will also need to provide that the counterparty will not be obliged to complete unless the overseas entity is fully compliant on the completion date. However, such contractual provisions only go so far, and there is still a risk that the overseas entity will not comply. It would also be open to abuse by an overseas entity: if they did not want to complete the transaction for some reason, they could fail to update their registration information in order to ensure that completion would not take place.

Question 28:

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

Paragraph 121 refer to overseas entities owning property through joint ventures and co-ownership and says you do not believe the OEBO register will alter the positon and rights of overseas entities in these arrangements. Should this be taken to imply that the OEBO requirements will only apply where an overseas entity is the sole owner rather than a co-owner or party to a joint venture?

It is not clear whether Question 28 should be interpreted generally or relates specifically to the joint ventures and co-ownership situation. We have identified areas where there are potential concerns relating to third party impact of the OEBO registration requirements. Please see our responses to Questions 13 and 14, and our additional comment at the end of this letter.

There is an additional general point we would like to mention. There will be situations where property is owned or acquired jointly by more than one overseas entity, or by one or more overseas entity together with other parties such as individuals and/or UK entities. However, this is not addressed in the call for

evidence and the implication is that such property would be affected by the proposed HM Land Registry restriction in the same way as property solely owned or acquired by an overseas entity. This raises the possibility that a party which owns or acquires property jointly with an overseas entity could be prejudiced by that overseas entity failing to comply with the registration requirements. This would be unsatisfactory so this is an area which requires detailed consideration. Such parties may be able to protect themselves through contractual provisions on new acquisitions, to some extent, but that will not be the case with properties that are already jointly owned in this manner when the registration requirements come into force. A joint owner may have no means of compelling a co-owner to comply so would require protection to avoid being unfairly prejudiced by the proposed HM Land Registry restriction.

Yours faithfully

Bond Dickinson LLP

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