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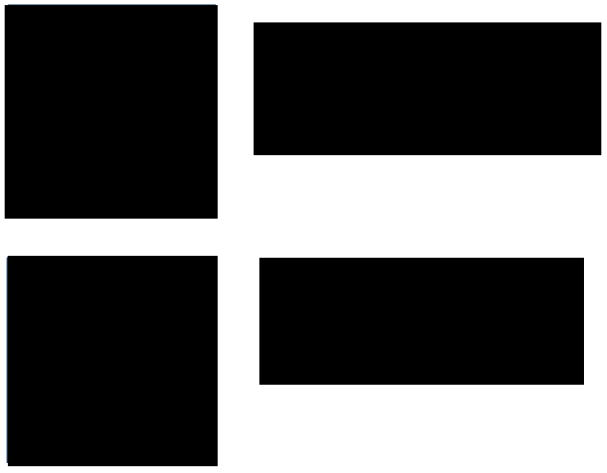
RESPONSE TO BEIS CONSULTATION ON REGISTER OF BENEFICIAL OWNERS OF OVERSEAS COMPANIES THAT OWN UK PROPERTY

15 May 2017



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Comments on BEIS's Consultation on register of beneficial owners of overseas legal entities that own UK property

Questions
Question 1: Do you think 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?
Response We agree that all overseas entities that can hold properties, should be in the scope of the new register's requirements.
Questions 2 and 3: Is the suggested definition of leasehold appropriate?
Response No, leases of capital value are usually 99 years or longer. It would be better for the regime to apply this when tenant is registerable and where a premium is paid to HMRC.
Question 4: Do you agree that the definition of beneficial owner for the new overseas rules should be aligned with the definition of PSC in the PSC regime?
Response Yes.
Question 7: What methods of raising awareness would be the most effective?
Response BEIS should, in conjunction with the LR and the CH, run awareness campaigns in relevant jurisdictions to ensure that overseas authorities are aware of the proposed changes Awareness should also be raised at appropriate global industry and trade fairs.
Question 9: What if any impact do you think the proposed policy will have on the UK property market (residential and commercial)?
Response It will in our opinion affect overseas investors who will see it as further evidence of a harder regulatory environment when doing business in the UK. This will add to the uncertainty of the Brexit issues and the recently announced changes to tax rules regarding interest payments for landlords. That said some mitigation of tax arises from de-enveloping (corporates to individuals). With regard to the increased compliance checks built into transactions in advance, there will be additional legal costs that will be incurred as lawyers will be required to manage and ensure that parties to a transaction are in compliance. In terms of practicalities there may be additional complications in terms of compliance, time and cost when dealing with complex structured portfolio sales with potentially diverse investor groups having beneficial ownership.

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?

Response

No. We think that the legislation should not be retrospective. It is inequitable and will have far reaching consequences.

Also if this proposal proceeds and there is a distressed environment and values are down - what protection will there be for lenders?

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

Response

Criminal sanctions are not appropriate.

Questions 12, 13 and 14

Response

These questions require a more detailed review. They are not acceptable as currently phrased or as envisaged as to the outcomes.

Beneficial interest in the real estate asset should not be prevented from passing to an overseas entity because the overseas entity does not have valid registration at completion.

Failure to register will prevent the overseas entity from selling, letting or charging the asset, and will significantly inhibit what the overseas entity can do with the real estate asset. This would also be problematic for any lender, as well as any prospective tenant or sub-tenant under a lease, or sub-lease. We gave an example of a new shopping centre owned by the entity.

In a typical real estate transaction (or conveyance), the proposals could cause significant impact and legal uncertainty in the market, and interfering with the passing of the beneficial interest is more likely to create unforeseen consequences and adversely impact on innocent parties such as tenants and lenders.

Typically, if exchange and then completion has taken place, and if the transfer (LR form TR1) has also been dated, then it is usual for the beneficial interest in the real estate asset to legally pass from the vendor to the overseas purchaser entity.

Further, the envisaged legislation needs to consider the potential impact where the completion proceeds have passed from the overseas purchaser entity to the vendor and may have been used by the vendor to redeem a mortgage, or in a chain transaction or for another purpose.

In accordance with the proposals, if the transfer is voided for lack of registration, then the Government needs to provide guidance on what happens to those sales proceeds? Do the sales proceeds have to be repaid to the overseas entity in those circumstances? Are the sales proceeds held on trust?

Since the purchaser may have paid a substantial sum for the real estate asset, it will be the purchaser and not the vendor who will be most concerned about its failure to be registered. Even though the vendor continues to have potential exposure under proposed legislation as it will remain the legal owner, such a concern of the vendor will usually be negated by the purchaser's more direct financial concerns. The reality therefore is that most overseas entities will want to be registered and do what has to be done to achieve this.

In the unlikely event that the overseas entity refuses to register itself at LR and the vendor continues to have an exposure as legal owner, consideration should be given to the relevant legislation including powers for a court to order the overseas entity to provide the registration number to enable

registration at LR.

Failure to comply with the order may lead to the legal interest in the real estate asset passing from the vendor to for example the Crown under the equivalent of a *bona vacantia* arrangement pending the registration of the overseas entity at LR, at which point it passes to the purchaser.

A failure by an overseas entity to register itself at LR will also have an adverse impact on a landlord if the overseas entity is a tenant. This is because the nature of the relationship between the landlord and the tenant is thrown into doubt. Whilst there may be contractual protections, that may not be the case and the legislation needs to provide a backstop protection for innocent parties.

Overseas entities that wish to sell property

A transfer should not be void if there is a failure to comply with the new requirements at the time of or following the dating of the transfer by the overseas entity vendor.

There should be a requirement for a valid registration number at the transfer date, but the failure to provide this should be a registration matter rather than one relating to the validity of the transfer. So the innocent purchaser can still benefit from the beneficial interest that it has paid for.

If there is no valid registration number at the date of completion, registration should still be permitted if a valid registration number is included with the application for registration.

Failure to comply with the order could perhaps lead to the legal interest in the property passing from the vendor to the purchaser. The overseas vendor has not been prejudiced since it has already received the proceeds for the sale which the legislation does not interfere with.

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

Response

Agreed.

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

Response

Yes.

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

Response

As discussed above, a criminal offence seems penal. A possible alternative would be civil sanctions by way of tiered fines and other censures.

Question 28: Are there any additional third party impacts that should also be addressed?
Response Lenders do not become mortgagee in possession due to the direct liabilities that arise. This is avoided by appointing receivers or administrators. Most lenders are not set up to manage assets. Existing and future lenders should not have to assume the possibly considerable liabilities of a mortgagee in possession in order to be able to enforce security and sell the asset. Consensual sales by Borrowers with the lenders' consent in situations where the Lenders are entitled to enforce their security should also be protected. In addition, what is the current thinking around ownership of property by a purchase and sale of shares (a very common mechanism in commercial property and tax structuring), as opposed to a transfer of land? Will an exemption be granted for a share sale entered into to mitigate SDLT charges?

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